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JUSTICE DEPARTMENT GUIDE

TO THE

FREEDOM OF INFORMATION ACT

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JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT

The "Justice Department Guide to the Freedom of Information Act" is an overview discussion of the FOIA's exemptions, its law enforcement record exclusions, and its most important procedural aspects. Prepared by the attorney and paralegal staff of the Office of Information and Privacy, it is updated and revised each year. Any inquiry about the points addressed below, or regarding matters of FOIA administration or interpretation, should be made through the Office of Information and Privacy's FOIA Counselor Service, at (202) 514-3642 (514-FOIA).

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INTRODUCTION

The Freedom of Information Act[1] generally provides that any person has a right, enforceable in court, of access to federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.

Enacted in 1966, the FOIA established for the first time an effective statutory right of access to government information. The principles of government openness and responsibility underlying the FOIA, however, are inherent in the democratic ideal: "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[2] The Supreme Court has emphasized that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose."[3]

To be sure, achieving an informed citizenry is a goal often counterpoised against other vital societal aims. Society's strong interest in an open government can conflict with other important interests of the general public--such as the public's interests in the effective and efficient operations of government; in the responsible governmental use of limited fiscal resources; and in the preservation of the confidentiality of sensitive personal, commercial, and governmental information. Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula that encompasses, balances, and appropriately protects all interests, while placing emphasis on maximum responsible disclosure.[4] It is this task of accommodating countervailing concerns, with disclosure as the predominant objective, that the FOIA seeks to accomplish.

The FOIA evolved after a decade of debate among agency officials, legislators, and public interest group representatives. It revised the public disclosure section of the Administrative Procedure Act,[5] which generally had been recognized as falling far short of its disclosure goals and had come to be looked upon by some as more a withholding statute than a disclosure statute.[6]

By contrast, under the thrust and structure of the FOIA, virtually every record possessed by a federal agency must be made available to the public in one form or another, unless it is specifically exempted from disclosure or spe-

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[1] 5 U.S.C. § 552 (1988).

[2] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

[3] United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

[4] See S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

[5] 5 U.S.C. § 1002 (1964) (amended 1966).

[6] See S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).

cially excluded from the Act's coverage in the first place.[7] The nine exemptions of the FOIA ordinarily provide the only bases for nondisclosure[8] and generally are discretionary, not mandatory in nature.[9] (For a discussion of the discretionary nature of FOIA exemptions, see Discretionary Disclosure and Waiver, below.) Dissatisfied record requesters are given a relatively speedy remedy in the United States district courts, where judges determine the propriety of agency withholdings de novo and agencies bear the burden of sustaining their nondisclosure actions.[10]

The FOIA contains six subsections, the first of which establishes two categories of information which must automatically be disclosed. Subsection (a)(1) of the FOIA[11] requires publication in the Federal Register of information such as descriptions of agency organization, functions, procedures, substantive rules and statements of general policy.[12] This requirement provides automatic public access to important basic information regarding the transaction of agency business.[13]

Subsection (a)(2) of the FOIA[14] requires that materials such as final opinions rendered in the adjudication of cases, specific policy statements, and certain administrative staff manuals routinely be made available for public inspec-

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[7] See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

[8] See 5 U.S.C. § 552(d).

[9] See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979); see also, e.g., FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

[10] See 5 U.S.C. § 552(a)(4)(B)-(C); see also FOIA Update, Spring 1985, at 6.

[11] 5 U.S.C. § 552(a)(1).

[12] See, e.g., Hughes v. United States, 953 F.2d 531, 539 (9th Cir. 1992); NI Indus., Inc. v. United States, 841 F.2d 1104, 1107 (Fed. Cir. 1988); Bright v. INS, 837 F.2d 1330, 1331 (5th Cir. 1988); see also DiCarlo v. Commissioner, T.C. Memo 1992-280, slip op. at 9-10 (May 14, 1992) (publication in United States Government Manual, special edition of Federal Register, satisfies publication requirement of subsection (a)(1)(A)) (citing 1 C.F.R. § 9 (1992)); cf., e.g., Daingerfield Island Protective Soc'y v. Babbitt, 823 F. Supp. 950, 958 (D.D.C. 1993) (approval of highway design by National Park Service not substantive rule and thus not required to be published in Federal Register).

[13] See FOIA Update, Summer 1992, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)") (advising agencies to meet their subsection (a)(1) responsibilities on no less than a quarterly basis).

[14] 5 U.S.C. § 552(a)(2).

tion and copying.[15] Additionally, these materials are required to be indexed to facilitate that public inspection.[16] These records commonly are referred to as "reading room" materials.[17] Public access to such information serves to guard against the development of agency "secret law" known to agency personnel but not to members of the public who deal with agencies.[18]

The courts have held that providing official notice and guidance to the general public is the fundamental purpose of the publication requirement of subsection (a)(1) and the availability requirement of subsection (a)(2).[19] Failure to comply with the requirements of either subsection can result in invalidation of related agency action,[20] unless the complaining party had actual and timely notice of the unpublished agency policy,[21] or unless he is unable to

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[15] See, e.g., Leeds v. Commissioner of Patents & Trademarks, 955 F.2d 757, 763 (D.C. Cir. 1992); Capuano v. National Transp. Safety Bd., 843 F.2d 56, 57-58 (1st Cir. 1988); Public Citizen v. Office of the U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (documents containing statements of policy or interpretations--in addition to descriptive information--held subject to subsection (a)(2)).

[16] 5 U.S.C. § 552(a)(2).

[17] See FOIA Update, Summer 1992, at 4 (advising that all agencies should at a minimum have published procedures by which "reading room" access is allowed).

[18] See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. at 153-54; Skelton v. Postal Serv., 678 F.2d 35, 41 (5th Cir. 1982) ("That requirement was designed to help the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency.'" (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 8 (1966))); see also Vietnam Veterans of America v. Department of the Navy, 876 F.2d 164, 165 (D.C. Cir. 1989) (opinions in which Judge Advocates General of Army and Navy have authority only to dispense legal advice--rendered in subject areas for which those officials do not have authority to act on behalf of agency--found not to be "statements of policy or interpretations adopted by" the agencies and held not required to be published or made available for public inspection).

[19] See, e.g., Welch v. United States, 750 F.2d 1101, 1111 (1st Cir. 1985).

[20] See, e.g., NI Indus., Inc. v. United States, 841 F.2d at 1108; D&W Food Ctrs., Inc. v. Block, 786 F.2d 751, 757-58 (6th Cir. 1986); Anderson v. Butz, 550 F.2d 459, 462-63 (9th Cir. 1977); see also Texas Health Care Ass'n v. Bowen, 710 F. Supp. 1109, 1113-14, 1116 (W.D. Tex. 1989).

[21] See, e.g., United States v. F/V Alice Amanda, 987 F.2d 1078, 1084-85 (4th Cir. 1993) (statutory defense of subsection (a)(1) not available where defendant had copy of unpublished regulations); United States v. Bowers, 920 F.2d 220, 222 (4th Cir. 1990) (IRS failure to publish tax forms did not preclude defendants' convictions for income tax evasion, as defendants had notice of duty to pay those taxes, duty is "manifest on face" of statutes, listing of

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show that he was adversely affected by the lack of publication.[22] However, unpublished interpretive guidelines that were available for copying and inspection in an agency program manual have been held not to violate subsection (a)(1),[23] and it also has been held that regulations pertaining solely to internal personnel matters that do not affect members of the public need not be published.[24]

Under subsection (a)(3)--by far the most commonly utilized portion of the FOIA--all records not covered by subsections (a)(1) or (a)(2),[25] or exempted from mandatory disclosure under subsection (b), or excluded under subsection (c), are subject to disclosure upon an agency's receipt of a proper access request from any person. (See discussions of the procedural aspects of subsection (a)(3) (including fees and fee waivers), the exemptions of subsection (b), and the exclusions of subsection (c), below.)

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[21](...continued)
places where forms can be obtained is published in Code of Federal Regulations, and defendants had filed tax returns before); Lonsdale v. United States, 919 F.2d 1440, 1447 (10th Cir. 1990); Tearney v. National Transp. Safety Bd., 868 F.2d 1451, 1454 (5th Cir. 1989); Bright v. INS, 837 F.2d at 1331; Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1018 (9th Cir. 1987); see also United States v. $200,000 in United States Currency, 590 F. Supp. 866, 874-75 (S.D. Fla. 1984) (alternative holding) (published regulations adequately apprised individuals of obligation to use unpublished reporting form).

[22] See, e.g., United States v. Bowers, 920 F.2d at 222; Sheppard v. Sullivan, 906 F.2d 756, 762 (D.C. Cir. 1990); Nguyen v. United States, 824 F.2d 697, 702 (9th Cir. 1987); Coos-Curry Elec. Coop., Inc. v. Jura, 821 F.2d 1341, 1347 (9th Cir. 1987).

[23] See McKenzie v. Bowen, 787 F.2d 1216, 1222-23 (8th Cir. 1986); see also Capuano v. National Transp. Safety Bd., 843 F.2d at 57-58; Medics, Inc. v. Sullivan, No. 88-2120, slip op. at 7-9 (D.P.R. May 31, 1991); Sturm v. James, 684 F. Supp. 1218, 1223 n.6 (S.D.N.Y. 1988).

[24] Pruner v. Department of the Army, 755 F. Supp. 362, 365 (D. Kan. 1991) (Army regulation governing procedures for applications for conscientious objector status concerned internal personnel matters and was not required to be published); see also Lonsdale v. United States, 919 F.2d at 1446-47 (FOIA does not require publication of Treasury Department orders which internally delegate authority to enforce internal revenue laws). But see also Smith v. National Transp. Safety Bd., 981 F.2d 1326, 1328-29 (D.C. Cir. 1993) (unpublished policy statement regarding sanctions not valid basis for suspension of license because sanctions policy affects public by altering public's behavior).

[25] See 5 U.S.C. § 552(a)(3) ("FOIA request" under subsection (a)(3) cannot be made for any records encompassed within "reading room" materials required to be made available under subsection (a)(2)); United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 152 (1989); Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653, 657 (9th Cir. 1980); see also FOIA Update, Summer 1992, at 4; FOIA Update, Spring 1991, at 5.

Subsection (c) of the FOIA, added as a part of the Freedom of Information Reform Act of 1986,[26] establishes three special categories of law enforcement-related records which have been entirely excluded from the coverage of the FOIA in order to safeguard against unique types of harm.[27] The extraordinary protection now embodied in subsection (c) permits an agency to respond to a request for such records as if the records in fact did not exist. (See discussion of the operation of these special provisions under Exclusions, below.)

Subsection (d) makes clear that the FOIA was not intended to authorize any new withholding of information, including from Congress. While individual Members of Congress possess merely the rights of access guaranteed to "any person" under subsection (a)(3), Congress as a body (or through its committees and subcommittees) cannot be denied access to information on the grounds of FOIA exemptions.[28]

Subsection (e) requires an annual report to Congress from each federal agency regarding its FOIA operations and an annual report from the Attorney General regarding FOIA litigation and the Department of Justice's efforts (through the Office of Information and Privacy) to encourage agency compliance with the FOIA. Subsection (f) defines the term "agency" so as to subject the records of nearly all executive branch entities to the FOIA. (See discussion of the term "agency" under Procedural Requirements, below.)

As originally enacted in 1966, the FOIA contained, in the views of many, weaknesses which detracted from its ideal operation. In response, the courts fashioned certain procedural devices, such as the requirement of a "Vaughn Index"--a detailed index of withheld documents and the justification for their exemption, established in Vaughn v. Rosen[29]--and the requirement that agencies release segregable nonexempt portions of a partially exempt record, first established in EPA v. Mink.[30]

In an effort to further extend the FOIA's disclosure requirements, and also as a reaction to the abuses of the Watergate era, the FOIA was substantial-

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[26] Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207, 3207-48.

[27] See generally Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18 (Dec. 1987) [hereinafter Attorney General's Memorandum].

[28] See FOIA Update, Winter 1984, at 3-4 ("OIP Guidance: Congressional Access Under FOIA" (citing, e.g., H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11-12 (1966))); see also 5 U.S.C. § 552a(b)(9) (1988) (counterpart provision of Privacy Act of 1974).

[29] 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[30] 410 U.S. 73, 91 (1973); see 5 U.S.C. § 552(b) (final sentence) (explicitly requiring disclosure of any "reasonably segregable" nonexempt information); see also, e.g., Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1068, 1071-72 (D.C. Cir. 1993) (emphasizing importance of Act's "reasonable segregation" requirement).

ly amended in 1974. The 1974 FOIA amendments considerably narrowed the overall scope of the Act's law enforcement and national security exemptions and broadened many of its procedural provisions, such as those relating to fees, time limits, segregability, and in camera inspection of withheld information by the courts.

In 1976, Congress again limited what could be withheld as exempt from disclosure under the FOIA, this time by narrowing its incorporation of the disclosure prohibitions of other statutes. (See discussion of Exemption 3, below.) A technical change was made in 1978 to update the FOIA's provision for administrative disciplinary proceedings,[31] and in 1984 Congress repealed the expedited court-review provision previously contained in former subsection (a)(4)(D) of the Act.[32]

In 1981, after several years of administrative experience with the FOIA, as amended, congressional hearings demonstrated that the Act was in need of both substantive and procedural reform.[33] Consequently, new FOIA amendments were advanced through the legislative process with the aim of strengthening the Act's nondisclosure provisions and improving many of its procedural provisions.[34] Through mid-1986, though, those FOIA reform efforts continued to be stalled.[35]

Late in 1986, however, in a relatively sudden development, Congress passed major FOIA reform legislation as part of the Anti-Drug Abuse Act of 1986. Signed into law on October 27, 1986, the Freedom of Information Reform Act of 1986[36] amended the FOIA to provide broader exemption protection for law enforcement information, plus special law enforcement record exclusions, and it also created a new fee and fee waiver structure.[37] While all of the law enforcement provisions of the 1986 FOIA amendments became ef-

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[31] 5 U.S.C. § 552(a)(4)(F) (1988).

[32] 5 U.S.C. § 552(a)(4)(D) (1982); see Federal Courts Improvement Act of 1984, Pub. L. No. 98-620, § 402, 98 Stat. 3335, 3357 (1984) (codified at 28 U.S.C. § 1657); see also FOIA Update, Spring 1985, at 6.

[33] See generally Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) (two volumes).

[34] See FOIA Update, Fall 1984, at 1; FOIA Update, Summer 1984, at 1, 4; FOIA Update, Winter 1984, at 1, 6; FOIA Update, Summer 1983, at 1-2; FOIA Update, Spring 1983, at 1; FOIA Update, June 1982, at 1-2; FOIA Update, March 1982, at 1-2; FOIA Update, Dec. 1981, at 1-2.

[35] See FOIA Update, Spring 1986, at 1.

[36] Pub. L. No. 99-570, 100 Stat. 3207.

[37] See FOIA Update, Fall 1986, at 1-2; see also id. at 3-6 (setting out statute in its amended form, interlineated to show exact changes made).

fective immediately, the revised fee and fee waiver provisions were made effective only after the expiration of a 180-day implementation period, on April 25, 1987, with implementing regulations required to be in place for their full effectiveness.[38] The Department of Justice and other federal agencies have taken numerous steps to implement all provisions of the 1986 FOIA amendments.[39]

In sum, the FOIA is a vital, continuously developing mechanism which, with necessary refinements to accommodate technological advancements[40] as well as society's countervailing interests in an open yet fully responsible government, can truly enhance our democratic way of life.

PROCEDURAL REQUIREMENTS

The Freedom of Information Act applies to "records" maintained by "agencies" within the executive branch of the federal government, including the Executive Office of the President and independent regulatory agencies.[1] Not included are records maintained by state governments,[2] by municipal corporations,[3] by the courts,[4] by Congress,[5] or by private citizens.[6]

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[38] See FOIA Update, Winter/Spring 1987, at 1-2.

[39] See id.; FOIA Update, Summer 1988, at 1-14; FOIA Update, Winter 1988, at 2; see also Attorney General's Memorandum.

[40] See, e.g., FOIA Update, Spring 1992, at 3 (discussing need to adjust FOIA to accommodate "electronic record" environment not envisioned when statute enacted).

[1] 5 U.S.C. § 552(f) (1988).

[2] See, e.g., Butler v. Marshall, No. 92-16955, slip op. at 2 (9th Cir. June 4, 1993); Smith v. Herriott, No. 91-35424, slip op. at 2 (9th Cir. June 9, 1992); Davidson v. Georgia, 622 F.2d 895, 897 (5th Cir. 1980); see also Gillard v. United States Marshals Serv., No. 87-0689, slip op. at 1-2 (D.D.C. May 11, 1987) (District of Columbia government records not covered).

[3] See, e.g., Rankel v. Town of Greensburgh, 117 F.R.D. 50, 54 (S.D.N.Y. 1987).

[4] See, e.g., Warth v. Department of Justice, 595 F.2d 521, 523 (9th Cir. 1979); Williams v. Thornburgh, No. 89-2152, slip op. at 2 n.2 (D.D.C. Mar. 24, 1992), summary affirmance granted sub nom. Williams v. Barr, No. 92-5149 (D.C. Cir. Jan. 29, 1993); see also Andrade v. United States Sentencing Comm'n, 989 F.2d 308, 309-10 (9th Cir. 1993) (Sentencing Commission, an independent body within judicial branch, not subject to FOIA); Chambers v. Division of Probation, No. 87-0163, slip op. at 2 (D.D.C. Apr. 8, 1987) (Division of Probation, part of Administrative Office of United States Courts, not covered).

[5] See, e.g., Goland v. CIA, 607 F.2d 339, 348 (D.C. Cir. 1978), cert. de-
(continued...)

PROCEDURAL REQUIREMENTS

In general, the FOIA does not apply to entities that "are neither chartered by the federal government [n]or controlled by it."[7] Nor does the FOIA apply to a presidential transition team.[8] Additionally, the personal staff of the President and units within the Executive Office of the President whose sole function is to advise and assist the President are not intended to fall within the definition of "agency."[9] The Court of Appeals for the District of Columbia Circuit illustrated this point this past year in holding that the former Presidential Task Force on Regulatory Relief--chaired by the Vice President and composed of several cabinet members--was not an agency for purposes of the FOIA, as the cabinet members were not acting as heads of their departments "but rather as the functional equivalents of assistants to the President."[10]

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[5](...continued)
nied, 445 U.S. 927 (1980); see also Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990) (Congress not an "agency" for any purpose under FOIA).

[6] See, e.g., Kurz-Kasch v. DOD, 113 F.R.D. 147, 148 (S.D. Ohio 1986).

[7] H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974); see, e.g., Forsham v. Harris, 445 U.S. 169, 179-80 (1980) (private grantee of federal agency not subject to FOIA); Public Citizen Health Research Group v. HEW, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (medical peer review committees not "agencies" under FOIA); Irwin Memorial Blood Bank v. American Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir. 1981) (American Red Cross not an "agency" under FOIA). But see also Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992) (Smithsonian Institution held an "agency" under FOIA on basis that it "performs governmental functions as a center of scholarship and national museum responsible for the safekeeping and maintenance of national treasures"); Association of Community Orgs. for Reform Now v. Barclay, No. 3-89-409T, slip op. at 8 (N.D. Tex. June 9, 1989) (holding federal home loan banks "agencies" under FOIA).

[8] Illinois Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229, 1232-33 (N.D. Ill. 1982); see also FOIA Update, Fall 1988, at 3-4 ("FOIA Counselor: Transition Team FOIA Issues").

[9] S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974); see, e.g., Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985) (Council of Economic Advisors held not an "agency" under FOIA); Nation Co. v. Archivist of the United States, No. 88-1939, slip op. at 5-6 (D.D.C. July 24, 1990) (Tower Commission held not an "agency" under FOIA); National Sec. Archive v. Executive Office of the President, 688 F. Supp. 29, 31 (D.D.C. 1988) (Office of Counsel to the President not an "agency" under FOIA), aff'd sub nom. National Sec. Archive v. Archivist of the United States, 909 F.2d 541 (D.C. Cir. 1990).

[10] Meyer v. Bush, 981 F.2d 1288, 1294 (D.C. Cir. 1993); cf. Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 911 (D.C. Cir. 1993) (President's Task Force on National Health Care Reform, composed of cabinet officials and chaired by First Lady, held not subject to Federal Advisory Committee Act).

Such government entities whose functions are not limited to advising and assisting the President are "agencies" under the FOIA.[11] For example, the D.C. Circuit, after examining one entity's responsibilities in detail, concluded that its investigatory, evaluative and recommendatory functions exceeded merely advising the President and that therefore it was an "agency" subject to the FOIA.[12]

The Supreme Court has articulated a basic, two-part test for determining what constitutes an "agency record" under the FOIA: "Agency records" are documents which are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.[13] The D.C. Circuit has provided comprehensive discussions of relevant factors and precedents regarding the "agency record" concept[14] and of how certain records maintained by

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[11] See Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971); see also Ryan v. Department of Justice, 617 F.2d 781, 784-89 (D.C. Cir. 1980).

[12] Energy Research Found. v. Defense Nuclear Facilities Safety Bd., 917 F.2d 581, 584-85 (D.C. Cir. 1990); see also Pacific Legal Found. v. Council on Envtl. Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (Council on Environmental Quality held an "agency" under FOIA).

[13] United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (court opinions in agency files held to be agency records); see, e.g., International Bhd. of Teamsters v. National Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (submission of gummed-label mailing list as required by court order held not sufficient to give "control" over record to agency); KDVA v. Thornburgh, No. 90-1536, slip op. at 11 (D.D.C. Sept. 30, 1992) (Canadian Safety Board report of aircrash, although possessed by National Transportation Safety Board, not under "control" of agency because of restrictions imposed by Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (documents submitted to FDA in "'legitimate conduct of its official duties'" are agency records notwithstanding FDA's presubmission review regulation allowing submitters to withdraw their documents from agency's files) (quoting Tax Analysts, 492 U.S. at 145), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992); Rush v. Department of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (correspondence between former ambassador and Henry Kissinger (then Assistant to the President) held "agency records" of Department of State as it exercised control over them); see also FOIA Update, Summer 1992, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

[14] See Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (transition team records, physically maintained within the "four walls" of agency, held not "agency records" under FOIA); see also, e.g., United States Dep't of Justice v. Tax Analysts, 492 U.S. at 146 (federal court tax opinions maintained and used by Justice Department's Tax Division are "agency records"); Hercules, Inc. v. Marsh, 838 F.2d 1027, 1029 (4th Cir. 1988) (army ammunition plant telephone directory prepared by contractor at government expense, bearing "property of

(continued...)

agency employees may qualify as "personal" rather than "agency" records.[15]

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[14](...continued)
the U.S." legend, held "agency record"); General Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (agency "use" of internal report submitted in connection with licensing proceedings resulted in finding report an "agency record"); Animal Legal Defense Fund v. Secretary of Agric., 813 F. Supp. 882, 892 (D.D.C. 1993) (plans regarding treatment of animals maintained on-site by entities subject to USDA regulation held not "agency records"); Rush Franklin Publishing, Inc. v. NASA, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) (mailing list created by contractor held not "agency record" as agency did not create, obtain or exercise control over it); Washington Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991) (transcript of closed congressional committee hearing furnished to testifying witnesses held not "agency record" as Congress had not "abandoned control over a transcript released to witnesses from an agency for the limited purpose of correcting and emending"); Lewisburg Prison Project, Inc. v. Federal Bureau of Prisons, No. 86-1339, slip op. at 4-5 (M.D. Pa. Dec. 16, 1986) (training videotape provided by contractor not "agency record"); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (records created outside federal government which the "agency in question obtained without legal authority" held not "agency records"), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987); Waters v. Panama Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) (Internal Revenue Code held not "agency record"); Center for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, held not "agency record"); see also "Department of Justice Report on 'Electronic Record' Issues under the Freedom of Information Act" [hereinafter Department of Justice "Electronic Record" Report], abridged in FOIA Update, Fall 1990, at 6-12 (discussing issue of "agency record" status of computer software).

[15] See Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1488-96 (D.C. Cir. 1984) (appointment calendars and telephone message slips of agency officials held not "agency records"); see also Gallant v. NLRB, No. 92-873, slip op. at 8 (D.D.C. Nov. 6, 1992) (letters written on agency time on agency equipment by board member seeking renomination, which had been reviewed by other agency employees but not integrated into agency record system and over which author had not relinquished control, held not "agency records") (appeal pending); Hamrick v. Department of the Navy, No. 90-283, slip op. at 6 (D.D.C. Aug. 28, 1992) (employee notebooks containing handwritten notes and comments, created and maintained for personal convenience and not placed in official files or referenced in agency documents, held not "agency records") (appeal pending); Sibille v. Federal Reserve Bank, 770 F. Supp. 134, 139 (S.D.N.Y. 1991) (handwritten notes of meetings and telephone conversations taken by employees for their personal convenience and not placed in agency's files held not "agency records"); Dow Jones & Co. v. GSA, 714 F. Supp. 35, 39 (D.D.C. 1989) (agency head's recusal list, shared only with personal secretary and chief of staff, held not "agency record"); Forman v. Chapotan, No. 88-1151, slip op. at 14 (W.D. Okla. Dec. 12, 1988)
(continued...)

PROCEDURAL REQUIREMENTS

Each federal agency is required to publish in the Federal Register its procedural regulations governing access to its records under the FOIA.[16] These regulations must inform the public of where and how to address requests; of what types of records are maintained by the agency; of its schedule of fees for search, review and duplication; of its fee waiver criteria; and of its administrative appeal procedures.[17] Although an agency may occasionally waive some aspect of its published procedures for reasons of public interest, speed, or simplicity, unnecessary bureaucratic hurdles should not be imposed and no requirement may be imposed on a requester beyond those prescribed in the agency's regulations.[18] A requester's failure to comply with an agency's procedural regulations governing first-party access to records has been held to constitute a failure to properly exhaust administrative remedies.[19]

A FOIA request can be made by "any person," as defined in 5 U.S.C.

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[15](...continued)
(materials distributed to agency officials at privately sponsored seminar held not "agency records"), aff'd, No. 89-6035 (10th Cir. Oct. 31, 1989); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (employee logs created voluntarily to facilitate work held not "agency records" even though containing substantive information), aff'd, 907 F.2d 203 (D.C. Cir. 1990); Miranda Manor v. HHS, No. 85-C-10015, slip op. at 5-7 (N.D. Ill. Apr. 7, 1986) (personal notes of agency surveyors held not "agency records"); Kalmin v. Department of the Navy, 605 F. Supp. 1492, 1494-95 (D.D.C. 1985) (uncirculated personal notes maintained at residence or in office desk drawer held personal property, not "agency records"); British Airports Auth. v. CAB, 531 F. Supp. 408, 416 (D.D.C. 1982) (employee notes maintained in personal file and retained at employee's discretion held not "agency records"); Porter County Chapter of the Izaak Walton League of Am. v. United States Atomic Energy Comm'n, 380 F. Supp. 630, 633 (N.D. Ind. 1974) (handwritten notes within personal files held not "agency records"); see also FOIA Update, Fall 1988, at 3-4 (discussing circumstances under which presidential transition team documents can be regarded as "personal records" when brought to federal agency); FOIA Update, Fall 1984, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'"). But see Washington Post Co. v. United States Dep't of State, 632 F. Supp. 607, 616 (D.D.C. 1986) (logs compiled by Secretary of State's staff--without his knowledge--held "agency records").

[16] 5 U.S.C. § 552(a)(3), (4)(A).

[17] See, e.g., 28 C.F.R. pt. 16(A) (1993) (Department of Justice FOIA regulations).

[18] See Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); see also FOIA Update, Summer 1989, at 5 (addressing submission of FOIA requests by "fax" in absence of contrary agency regulation).

[19] See, e.g., Keil v. HHS, No. 88-C-360, slip op. at 3-4 (E.D. Wis. May 20, 1989); see also Muhammad v. United States Bureau of Prisons, 789 F. Supp. 449, 450 (D.D.C. 1992) (inmate's initial request for records made to court, rather than to agency, "constitutes a failure to exhaust his administrative remedies").

§ 551(2), which encompasses individuals (including foreign citizens), partnerships, corporations, associations and foreign or domestic governments.[20] The statute specifically excludes federal agencies from the definition of a "person,"[21] but state agencies certainly can make FOIA requests.[22] The only apparent exception of any significance to this broad "any person" standard is for those who flout the law, such as a fugitive from justice.[23] This is true also where the FOIA plaintiff is an agent acting on behalf of a fugitive.[24]

FOIA requests can be made for any reason whatsoever, with no showing of relevancy required. Because the purpose for which records are sought "has no bearing" upon the merits of the request, FOIA requesters do not have to explain or justify their requests.[25] As a result, despite repeated Supreme Court admonitions for restraint,[26] the FOIA has been invoked successfully as a

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[20] See generally Doherty v. United States Dep't of Justice, 596 F. Supp. 423, 427 n.4 (S.D.N.Y. 1984) (reviewing legislative history), aff'd on other grounds, 775 F.2d 49 (2d Cir. 1985); see, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 840 n.2 (6th Cir. 1988) (recognizing standing of attorney to request documents on behalf of client).

[21] See FOIA Update, Winter 1985, at 6 (citing 5 U.S.C. § 551(2)).

[22] See, e.g., Texas v. ICC, 935 F.2d 728, 728 (5th Cir. 1991); Massachusetts v. HHS, 727 F. Supp. 35, 35 (D. Mass. 1989).

[23] See Doyle v. United States Dep't of Justice, 494 F. Supp. 842, 843 (D.D.C. 1980) (fugitive not entitled to enforcement of the FOIA's access provisions because he cannot expect judicial aid in obtaining government records when he has fled the jurisdiction of the courts), aff'd, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982). But cf. O'Rourke v. United States Dep't of Justice, 684 F. Supp. 716, 718 (D.D.C. 1988) (convicted criminal, a fugitive from his home country undergoing U.S. deportation proceedings, held to qualify as "any person" for purpose of making FOIA request); Doherty v. United States Dep't of Justice, 596 F. Supp. at 424-29 (same).

[24] See Javelin Int'l, Ltd. v. United States Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,141, at 82,479 (D.D.C. Dec. 9, 1981).

[25] United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989); see North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989) (requester's identity and intended use not proper factors in determining access rights under FOIA); Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access to agency records."), cert. granted, judgment vacated on other grounds & remanded, 486 U.S. 1029 (1988); Forsham v. Califano, 587 F.2d 1128, 1134 (D.C. Cir. 1978) (while factors such as need, interest or public interest may bear on agency's determination of order of processing, they have no bearing on individuals' rights of access under FOIA); see also FOIA Update, Spring 1989, at 5; FOIA Update, Summer 1985, at 5.

[26] See United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02

(continued...)

substitute for, or a supplement to, document discovery in the contexts of both civil[27] and criminal[28] litigation.

By the same token, as the Supreme Court has stated, a FOIA requester's basic rights to access "are neither increased nor decreased" by virtue of having a greater interest in the records than that of an average member of the general public.[29] However, such considerations do logically have a bearing on certain procedural areas of the FOIA--such as expedited access, waiver or reduction of fees, and the award of attorney's fees and costs to a successful FOIA plaintiff--where it is appropriate to examine a requester's need or purpose in seeking records. And as the Supreme Court has observed, a requester's identity can be significant in one substantive respect: "The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating [an exemption] differently as to one class of those who make requests than as to another class."[30] In short, an agency should not invoke a FOIA exemption to

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[26](...continued)
(1984); Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974).

[27] See, e.g., Jackson v. First Fed. Sav., 709 F. Supp. 887, 889 (E.D. Ark. 1989); see also FOIA Update, Dec. 1981, at 10. But cf. Injex Indus. v. NLRB, 699 F. Supp. 1417, 1419 (N.D. Cal. 1986) (FOIA cannot be used to circumvent nonreviewable decision to impound requested documents); Morrison-Knudsen Co. v. Department of the Army of the United States, 595 F. Supp. 352, 356 (D.D.C. 1984) ("[T]he use of FOIA to unsettle well established procedures governed by a comprehensive regulatory scheme must be . . . viewed not only 'with caution' but with concern."), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite).

[28] See, e.g., North v. Walsh, 881 F.2d at 1096.

[29] NLRB v. Sears, Roebuck & Co., 421 U.S. at 143 n.10; see also United States v. United States Dist. Court, Central Dist. of Cal., 717 F.2d 478, 480 (9th Cir. 1983) (FOIA does not expand scope of criminal discovery permitted under Rule 16 of Federal Rules of Criminal Procedure); Johnson v. United States Dep't of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality is . . . outside the proper role of FOIA."); Stimac v. United States Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) ("Brady v. Maryland . . . provides no authority for releasing material under FOIA."); cf. Calder v. IRS, 890 F.2d 781, 783 (5th Cir. 1989) (historian denied access under FOIA also held to have no "constitutional right of access" to Al Capone's tax records).

[30] United States Dep't of Justice v. Julian, 486 U.S. 1, 14 (1988); accord United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. at 771 (recognizing single exception to general FOIA-disclosure rule in case of "first-party" requester).

protect a requester from himself.[31]

The FOIA specifies only two requirements for access requests: that they "reasonably describe" the records sought[32] and that they be made in accordance with agencies' published procedural regulations.[33] The legislative history of the 1974 FOIA amendments indicates that a description of a requested record is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort."[34] It has been observed that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters."[35] Accordingly, one FOIA request was held invalid on the grounds that it required an agency's FOIA staff either to have "clairvoyant capabilities" to discover the requester's needs or to spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks."[36] However, an agency "must be careful not to read [a] request so strictly that the requester is denied

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[31] See FOIA Update, Spring 1989, at 5 (advising agencies to treat first-party FOIA requests in accordance with the protectible interests that requesters can have in their own information, such as with personal privacy information, and to treat third-party FOIA requesters differently).

[32] 5 U.S.C. § 552(a)(3)(A).

[33] 5 U.S.C. § 552(a)(3)(B); see, e.g., McDonnell v. United States, No. 91-5916, slip op. at 10-11 (3d Cir. Sept. 21, 1993) (to be published).

[34] H.R. Rep. No. 876, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271; see also, e.g., Brumley v. United States Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985); Goland v. CIA, 607 F.2d at 353; Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978).

[35] Assassination Archives & Research Ctr., Inc. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 13, 1990); Blakey v. Department of Justice, 549 F. Supp. 362, 366-67 (D.D.C. 1982), aff'd, 720 F.2d 215 (D.C. Cir. 1983) (table cite); see also Trenerry v. Department of the Treasury, No. 92-5053, slip op. at 6 (10th Cir. Feb. 5, 1993) (agency not required to provide personal services such as legal research); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1280-82 (D.C. Cir. 1992) (burden is on requester, not agency, to show prior disclosure of otherwise exempt records).

[36] Devine v. Marsh, 2 Gov't Disclosure Serv. (P-H) ¶ 82,022, at 82,186 (E.D. Va. Aug. 27, 1981); see also Canning v. United States Dep't of Justice, No. 92-503, slip op. at 2 (D.D.C. July 15, 1992) (subsequent request for additional searches of State Department files "unjustified" after agency had conducted "reasonable and adequate search"); Freeman v. United States Dep't of Justice, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish."); Massachusetts v. HHS, 727 F. Supp. at 36 n.2 (request for all records "relating to" particular subject held overbroad, "thus unfairly plac[ing] the onus of non-production on the recipient of the request and not where it belongs--upon the person who drafted such a sloppy request").

information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester."[37]

The fact that a FOIA request is very broad or "burdensome" in its magnitude does not, in and of itself, entitle an agency to deny that request on the ground that it does not "reasonably describe" the records sought.[38] The key factor is the ability of an agency's staff to reasonably ascertain and locate exactly which records are being requested.[39] It has been held that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records.[40]

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[37] Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985); see also Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984) (agency required to read FOIA request as drafted, "not as either [an] agency official or [the requester] might wish it was drafted"); Ferri v. Bell, 645 F.2d 1213, 1220 (3d Cir. 1981) (request "inartfully presented in the form of questions" cannot be dismissed, in toto, as too burdensome); Landes v. Yost, No. 89-6338, slip op. at 4-5 (E.D. Pa. Apr. 11, 1990) (request found "reasonably descriptive" where it relied on agency's own outdated identification code), aff'd, 922 F.2d 832 (3d Cir. 1990) (table cite); FOIA Update, Summer 1983, at 5; cf. Truitt v. Department of State, 897 F.2d 540, 544-46 (D.C. Cir. 1990) (where request was "reasonably clear as to the materials desired," agency failed to conduct adequate search as its search did not include file likely to contain responsive records). But see also Maynard v. CIA, 986 F.2d 547, 560 (1st Cir. 1993) (agency search properly limited to scope of FOIA request, with no requirement that secondary references or variant spellings be checked).

[38] See FOIA Update, Summer 1983, at 5.

[39] See Yeager v. DEA, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding valid a request encompassing over 1,000,000 computerized records: "The linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested.'") (quoting legislative history).

[40] See Van Strum v. EPA, No. 91-35404, slip op. at 3 (9th Cir. Aug. 17, 1992) (agency justified in denying or seeking clarification of overly broad requests which would place inordinate search burden on agency resources); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) (holding request which would require agency "to locate, review, redact, and arrange for inspection a vast quantity of material" to be "so broad as to impose an unreasonable burden upon the agency" (citing Goland v. CIA, 607 F.2d at 353)); Marks v. United States Dep't of Justice, 578 F.2d at 263 (FBI not required to search every one of its field offices); Canning v. United States Dep't of the Treasury, No. 91-2324, slip op. at 8 (D.D.C. Apr. 28, 1993) ("[I]f the locations to be searched are not plain from the face of the request, the government agency . . . need not imply additional locations into the search."); Roberts v. United States Dep't of Justice, No. 92-1707, slip op. at 3 (D.D.C. Jan. 28, 1993) (agency not expected to "search every nook and cranny of its vast offices" in order to locate records which requester believes may exist); Nance v. United States Postal Serv., No. 91-

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It also has been held by the courts that agencies do not have to organize or reorganize file systems in order to respond to particular FOIA requests,[41] to write new computer programs to search for "electronic" data not already compiled for agency purposes,[42] or to aggregate computerized data files so as to effectively create new, releasable records.[43] The adequacy of an agency's search under the FOIA is to be determined by a test of "reasonableness," which may vary from case to case.[44] (For a discussion of the litigation aspects of adequacy of search, see Litigation Considerations, below.)

Although "a person need not title a request for government records a

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[40](...continued)
1183, slip op. at 5 n.3 (D.D.C. Jan. 24, 1992) (dictum) (there may be instances where "search burden is too disruptive," regardless of requester's ability to pay fees); Hale Fire Pump Co. v. United States, No. 90-2714, slip op. at 2 (E.D. Pa. July 30, 1990) (agency not required to direct FOIA request to "hundreds of [its] installations that might have responsive documents"); see also, e.g., Nolen v. Rumsfeld, 535 F.2d 890, 891-92 (5th Cir. 1976) (FOIA does not compel agencies to locate missing records), cert. denied, 429 U.S. 1104 (1977). But see also Truitt v. Department of State, 897 F.2d at 546 (subsequent search required for responsive records agency knew were removed from file).

[41] See, e.g., Church of Scientology v. IRS, 792 F.2d 146, 150-51 (D.C. Cir. 1986); Miller v. United States Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1986); Neff v. IRS, No. 85-816, slip op. at 8 (S.D. Fla. Nov. 24, 1986); Auchterlonie v. Hodel, No. 83-C-6724, slip op. at 13 (N.D. Ill. May 7, 1984).

[42] See Burlington N. R.R. v. EPA, No. 91-1636, slip op. at 4 (D.D.C. June 15, 1992); Clarke v. United States Dep't of the Treasury, No. 84-1873, slip op. at 2-3 (E.D. Pa. Jan. 24, 1986); see also FOIA Update, Spring 1992, at 3-7 (congressional testimony discussing "electronic record" FOIA issues).

[43] See Yeager v. DEA, 678 F.2d at 324; see also Department of Justice "Electronic Record" Report, abridged in FOIA Update, Spring/Summer 1990, at 8-21 (discussing use of "computer programming" for FOIA search and processing purposes). But cf. International Diatomite Producers Ass'n v. United States Social Sec. Admin., No. 92-1634, slip op. at 13-14 (N.D. Cal. Apr. 28, 1993) (agency must respond to request for specific information, portions of which are maintained in four separate computerized listings, by either compiling new list or redacting existing lists) (appeal pending).

[44] See Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (agency may not limit search to one record system if others are likely to contain responsive records); Meeropol v. Meese, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request."); Spannaus v. DOD, No. 92-2435, transcript at 16 (D.D.C. Sept. 13, 1993) (bench order) (fact that it is "conceivable" that other responsive documents exist "does not mean that the search itself was inadequate"); see also Zemansky v. EPA, 767 F.2d at 571-73 (reasonableness of agency search depends upon facts of each case (citing Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983))).

'FOIA request.'"[45] a request should be made in full observance of an agency's procedural regulations.[46] However, agencies should exercise sound administrative discretion in this regard--for example, a first-party access request that cites only the Privacy Act of 1974[47] should be processed under both that statute and the FOIA as well.[48]

Until a FOIA request is properly received by an agency (and, further, by the proper component of that agency), there is no obligation on the agency to search, to meet time deadlines or to release documents.[49] Requests not filed in accordance with published regulations are not deemed to have been received until such time as they are identified as proper FOIA requests by agency personnel.[50] For example, the Department of Justice regulation requiring either a promise to pay fees (above a minimum amount) or a determination to waive all fees before the request is deemed received[51] has been specifically upheld.[52] Moreover, if a requester fails to pay properly assessed search, review and/or duplication fees, despite his prior commitment to pay such an amount, an agency may refuse to process subsequent requests until that outstanding balance is fully paid by the requester.[53] (For a discussion of procedures pertaining to the assessment of fees, see Fees and Fee Waivers, below.)

Once an agency is in receipt of a proper FOIA request, it is required to inform the requester of its decision to grant or deny access to the requested

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[45] Newman v. Legal Servs. Corp., 628 F. Supp. 535, 543 (D.D.C. 1986); see also FOIA Update, Winter 1986, at 6.

[46] See, e.g., Church of Scientology v. IRS, 792 F.2d at 150 (requesters must follow "the statutory command that requests be made in accordance with published rules"). But see also Summers v. United States Dep't of Justice, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (holding that 28 U.S.C. § 1746--which requires that unsworn declarations be treated with "like force and effect" as sworn declarations--can be used in place of notarized-signature requirement of agency regulation for verification of FOIA privacy waivers).

[47] 5 U.S.C. § 552a.

[48] See FOIA Update, Winter 1986, at 6.

[49] See Brumley v. United States Dep't of Labor, 767 F.2d at 445; see also McDonnell v. United States, slip op. at 11 (person whose name does not appear on request does not have standing).

[50] See, e.g., Lykins v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,092, at 83,637 (D.D.C. Feb. 28, 1983).

[51] 28 C.F.R. § 16.10(e) (1993).

[52] See Irons v. FBI, 571 F. Supp. 1241, 1243 (D. Mass. 1983); see also Oglesby v. United States Dep't of the Army, 920 F.2d at 66.

[53] See Atkin v. EEOC, No. 92-3275, slip op. at 5 (D.N.J. June 24, 1993); Crooker v. United States Secret Serv., 577 F. Supp. 1218, 1219-20 (D.D.C. 1983); FOIA Update, Spring 1986, at 2; see also 5 U.S.C. § 552(a)(4)(A)(v).

records within ten working days.[54] Agencies are not necessarily required to release records within the ten days, but access to releasable records should be granted promptly thereafter.[55] The FOIA provides for extensions of initial time limits for three specific situations: (1) the need to search for and collect records from separate offices; (2) the need to examine a voluminous amount of records required by the request; and (3) the need to consult with another agency or agency component.[56] Further, determinations of administrative appeals are required to be made within twenty working days.[57]

In many instances, however, agencies are unable to meet these time limits for a variety of reasons, including the limitations of their resources.[58] The D.C. Circuit has approved the general practice of handling backlogged FOIA requests on a "first-in, first-out" basis.[59] However, if a requester can show an "exceptional need or urgency," his or her request may be "expedited" and processed out of sequence.[60] Expedited access has been granted where exceptional circumstances surrounding a request warrant such treatment to the relative disadvantage of prior FOIA requesters, such as jeopardy to life or personal safety,[61] or a threatened loss of substantial due process rights.[62] (For a fur-

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[54] 5 U.S.C. § 552(a)(6)(A)(i); see also FOIA Update, Summer 1992, at 5 (merely acknowledging request within ten-day period is simply insufficient).

[55] 5 U.S.C. § 552(a)(6)(C); see Larson v. IRS, No. 85-3076, slip op. at 2-3 (D.D.C. Dec. 11, 1985) (As the FOIA "does not require that the person requesting records be informed of the agency's decision within ten days, it only demands that the government make [and mail] its decision within that time."). Contra Manos v. United States Dep't of the Air Force, No. C-92-3986, slip op. at 12 (N.D. Cal. Feb. 10, 1993) (exceptional decision holding that mailing response within ten-day period not sufficient and that requester must actually receive response within ten-day period).

[56] 5 U.S.C. § 552(a)(6)(B).

[57] 5 U.S.C. § 552(a)(6)(A)(ii).

[58] See, e.g., FOIA Update, Spring 1992, at 8-10; FOIA Update, Winter 1990, at 1-2.

[59] Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 614-16 (D.C. Cir. 1976) (citing 5 U.S.C. § 552(a)(6)(C)).

[60] Id. at 616; see FOIA Update, Summer 1983, at 3 ("OIP Guidance: When to Expedite FOIA Requests"); see also FOIA Update, Summer 1992, at 5 (emphasizing need to promptly determine whether to expedite processing of a request).

[61] See, e.g., Exner v. FBI, 443 F. Supp. 1349, 1353 (S.D. Cal. 1978) (plaintiff entitled to expedited access after leak of information exposed her to harm from organized crime figures), aff'd, 612 F.2d 1202 (9th Cir. 1980); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff faced multiple criminal charges carrying possible death penalty in state court); compare Free-

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ther discussion of expedited access, see the "Open America" Stays subsection of Litigation Considerations, below.)

When an agency locates records responsive to a FOIA request, it should determine whether any of those records, or information contained in those records, originated with another agency or agency component.[63] As a matter of sound administrative practice, an agency receiving such a request should consult with the component or agency whose information appears in responsive records and, if the response to that consultation is delayed, notify the requester that a supplemental response will follow its completion.[64] When entire records originating with another agency or component are located, those records ordinarily should be referred to their originating agency for its direct response to the requester,[65] and the requester ordinarily should be advised of such a referral.[66] Some agencies have streamlined their practices of continually referring certain routine records or classes of records to other agencies or components by

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[61](...continued)
man v. United States Dep't of Justice, No. 92-557, slip op. at 6 (D.D.C. Oct. 2, 1992) (expedited treatment granted where requester "reasonably has demonstrated" that FOIA release may produce information from limited amount of records that will assist his defense of pending state criminal charges where discovery not available) with Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 11-12 (D.D.C. June 28, 1993) (denying any further expedited treatment for requested "hand search of approximately 50,000 pages").

[62] See, e.g., Ferguson v. FBI, 722 F. Supp. 1137, 1141-43 (S.D.N.Y. 1989) (noting that "due process interest must be substantial" and holding that plaintiff's request for information regarding his particular postconviction proceeding required expedition).

[63] Accord 5 U.S.C. § 552(a)(6)(B)(iii).

[64] See FOIA Update, Summer 1991, at 3-4 ("OIP Guidance: Referral and Consultation Procedures").

[65] See id.; FOIA Update, Summer 1983, at 5; see, e.g., Stone v. Defense Investigative Serv., No. 91-2013, slip op. at 2 (D.D.C. Feb. 24, 1992) (agencies may refer responsive records to originating agencies in responding to FOIA requests), aff'd, 978 F.2d 744 (D.C. Cir. 1992) (table cite); see also, e.g., 28 C.F.R. § 16.4(c) (1993) (Department of Justice FOIA regulation concerning referrals and consultations). But see also Williams v. FBI, No. 92-5176, slip op. at 2 (D.C. Cir. May 7, 1993) (illustrating that, in litigation, referring agency is nevertheless required to justify withholding of record that was referred to another agency); Grove v. Department of Justice, 802 F. Supp. 506, 518 (D.D.C. 1992) (agency may not use "'consultation' as its reason for a deletion, without asserting a valid exemption").

[66] But see FOIA Update, Spring 1991, at 6 (warning agencies not to notify requesters of identities of other agencies to which record referrals are made, in any exceptional case in which so doing would reveal sensitive abstract fact about record's existence).

establishing standard processing protocols.[67]

Regarding the mechanics of responding to FOIA requests, it should be noted that the D.C. Circuit has suggested that an agency is not required to mail copies of requested records to a FOIA requester if it prefers to make the "responsive records available in one central location for [the requester's] perusal."[68] As a matter of sound policy and administrative practice, however, the Department of Justice strongly advises agencies to decline to follow such a practice except where it is the requester's preference as well.[69]

The Act requires that "any reasonably segregable portion of a record" must be released after appropriate application of the nine exemptions.[70] Agencies should pay particularly close attention to this "reasonably segregable" requirement as the courts can closely examine whether segregability determinations have been made properly.[71] (For a further discussion of segregability, see the "Vaughn Index" subsection of Litigation Considerations, below.) If, however, an agency determines that nonexempt material is so "inextricably intertwined" that disclosure of it would "leave only essentially meaningless words and phrases," the entire record may be withheld.[72] In cases involving a

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[67] See, e.g., 28 C.F.R. § 16.4(g) (1993) (Department of Justice FOIA regulation on such formal or informal agreements).

[68] Oglesby v. United States Dep't of the Army, 920 F.2d at 69.

[69] See FOIA Update, Spring 1991, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision"); accord Carson v. United States Dep't of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980).

[70] 5 U.S.C. § 552(b) (final sentence).

[71] See, e.g., Krikorian v. Department of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (affirming general application of exemption but nevertheless remanding to district court for finding as to segregability); Schiller v. NLRB, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992) (noting that agency's affidavit referred to withholding of "documents, not information," and remanding for specific finding as to segregability); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 983 (1st Cir. 1985) ("detailed process of segregation" held not unreasonable for request involving 36 document pages); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970) ("statutory scheme does not permit a bare claim of confidentiality to immunize agency [records] from scrutiny" in their entireties); Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) ("The burden is on the agency to prove the document cannot be segregated for partial release.") (appeal pending); Schreibman v. United States Dep't of Commerce, 785 F. Supp. 164, 166 (D.D.C. 1991) (segregation required for computer vulnerability assessment withheld under Exemption 2); Wellford v. Hardin, 315 F. Supp. 768, 770 (D.D.C. 1970) ("It is a violation of the Act to withhold [entire] documents on the ground that parts are exempt and parts [are] nonexempt.").

[72] Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981); see Local 3, Int'l

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large amount of records or an unreasonably high-cost "line-by-line" review, it has been held that agencies may withhold small segments of nonexempt facts "if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing by the courts would impose an inordinate burden."[73]

It also has been held without contradiction that the agency, not the requester, has the right to choose the format of disclosure, so long as the agency chooses reasonably under the circumstances presented.[74] While it is well established "that computer-stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are records for the purposes of the FOIA,"[75] it also has been held that the FOIA "in no way contemplates

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[72](...continued)
Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988); Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977); see also Yeager v. DEA, 678 F.2d at 322 n.16 (appropriate to consider "intelligibility" of document and burden imposed by editing and segregation of nonexempt matters).

[73] Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979); see also Doherty v. United States Dep't of Justice, 775 F.2d at 53 ("The fact that there may be some nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing approximately 300 pages of documents, line-by-line."); Neufeld v. IRS, 646 F.2d at 666 (segregation not required where it "would impose significant costs on the agency and produce an edited document of little informational value"); Journal of Commerce v. United States Dep't of the Treasury, No. 86-1075, slip op. at 16 (D.D.C. Mar. 30, 1988) (segregation "neither useful, feasible nor desirable" where it would compel agency "to pour through [literally millions of pages of documents] to segregate nonexempt material [and] would impose an immense administrative burden . . . that would in the end produce little in the way of useful nonexempt material").

[74] See Coalition for Alternatives in Nutrition & Healthcare v. FDA, No. 90-1025, slip op. at 3 (D.D.C. Jan. 4, 1991) (release of requested documents in microfiche format, rather than paper, held to be disclosure in "reasonably accessible form"); National Sec. Archive v. CIA, No. 88-119, slip op. at 1-2 (D.D.C. July 26, 1988) (agency not required to provide requested records in "electronic data base" format where it already had provided paper copy in response to FOIA request), aff'd on mootness grounds, No. 88-5298 (D.C. Cir. Feb. 6, 1989); Dismukes v. Department of the Interior, 603 F. Supp. 760, 761-63 (D.D.C. 1984) (providing requested data in microfiche form, rather than "9 track, 1600 bpi, DOS or unlabeled, IBM Compatible formats, with file dumps and file layouts," held proper in light of fact that microfiche form preferred by most requesters as well as by agency); see also Department of Justice "Electronic Record" Report, abridged in FOIA Update, Fall 1990, at 3-6 (discussing "choice of format" issues regarding "electronic records").

[75] Yeager v. DEA, 678 F.2d at 321; see Long v. IRS, 596 F.2d 362, 364-
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that agencies, in providing information to the public, should invest in the most sophisticated and expensive form of technology."[76]

All notifications to requesters of denials of initial requests and appeals should contain certain specific information. While "[t]here is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation,"[77] a decision to deny an initial request must inform the requester of the reasons for denial, of the right to appeal and of the name and title of each person responsible for the denial.[78] Agencies now must include administrative appeal notifications in all of their "no record" responses to FOIA requesters.[79] An administrative appeal decision upholding a denial must inform the requester of the reasons for denial, of the requester's right to judicial review in the federal courts and of the name and title of each person responsible for the appeal denial.[80]

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[75](...continued)
65 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980); see also FOIA Update, Spring/Summer 1990, at 4 n.1.

[76] Martin & Merrell, Inc. v. United States Customs Serv., 657 F. Supp. 733, 734 (S.D. Fla. 1986) ("computer terminals for public reference" not required).

[77] Crooker v. CIA, No. 83-1426, slip op. at 3 (D.D.C. Sept. 28, 1984); see Schaake v. IRS, No. 91-958, slip op. at 9-10 (S.D. Ill. June 3, 1991) (court "lacks jurisdiction" to require agency to provide Vaughn Index at initial request or administrative appeal stages); SafeCard Servs., Inc. v. SEC, No. 84-3073, slip op. at 4-5 (D.D.C. Apr. 21, 1986) (requester has no right to Vaughn Index during administrative process), aff'd & remanded on other grounds, 926 F.2d 1197 (D.C. Cir. 1991); see also FOIA Update, Summer 1986, at 6.

[78] 5 U.S.C. § 552(a)(6)(A)(i), (C); see also Mayock v. INS, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (denying plaintiff's request for Vaughn Index at administrative level, but suggesting that even agency's own regulations require "more information than just the number of pages withheld and an unexplained citation to the exemptions"), rev'd & remanded on other grounds sub nom. Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991); Hudgins v. IRS, 620 F. Supp. 19, 20-21 (D.D.C. 1985) (suggesting that statements of appellate rights should be provided even where request was interpreted by agency as not reasonably describing records), aff'd, 808 F.2d 137 (D.C. Cir.), cert. denied, 484 U.S. 803 (1987); see also FOIA Update, Fall 1985, at 6 (discussing significance of apprising requesters of their rights to file administrative appeals of adverse FOIA determinations).

[79] See Oglesby v. United States Dep't of the Army, 920 F.2d at 67 (holding that a "no record" response constitutes an "adverse determination" and therefore requires notification of appeal rights under 5 U.S.C. § 552(a)(6)(A)(i)); see also FOIA Update, Spring 1991, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (superseding FOIA Update, Summer 1984, at 2).

[80] 5 U.S.C. § 552(a)(6)(A)(ii), (C).

Notifications to requesters should also contain other pertinent information: when and where records will be made available; what fees, if any, must be paid prior to the granting of access; what records are or are not responsive to the request; the date of receipt of the request/appeal; and the nature of the request/appeal and, where appropriate, the agency's interpretation of it.[81] Agencies may apply a "cut-off" date for including records as responsive to requests.[82] Where an agency employs a particular "cut-off" date, however, it should give notice of that to requesters through a published regulation to that effect, if not also in the agency's letter to the requester as well.[83] As this letter of notification is the primary means of agency communication with a FOIA requester, as well as potentially the initial basis for the agency's position in the event of litigation, it should be as comprehensive as reasonably possible.[84]

An agency's failure to comply with the time limits for either the initial request or the administrative appeal may be treated as a "constructive exhaustion" of administrative remedies, and a requester may immediately seek judicial review if he or she wishes to do so.[85] However, the D.C. Circuit has modified this rule of constructive exhaustion by holding that once the agency responds to the FOIA request--after the ten-day time limit but before the requester has filed suit--the requester must administratively appeal the denial before proceeding to court.[86] (For a discussion of the litigation aspects of exhaustion of

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[81] See, e.g., Astley v. Lawson, No. 89-2806, slip op. at 5 (D.D.C. Jan. 11, 1991) (suggesting that agency "might have been more helpful" to requester by "explaining why the information he sought would not be provided").

[82] See, e.g., Church of Scientology v. IRS, 816 F. Supp. at 1148 (documents generated subsequent to date specified in request held outside of scope of request and need not be disclosed).

[83] Accord McGehee v. CIA, 697 F.2d 1095, 1105 (D.C. Cir.), vacated on other grounds on panel reh'g & reh'g en banc denied, 711 F.2d 1076 (D.C. Cir. 1983); see also FOIA Update, Fall 1983, at 14; see also, e.g., 28 C.F.R. § 16.4(j) (1993).

[84] See Grove v. Department of Justice, 802 F. Supp. 506, 519 (D.D.C. 1992) (agency required to provide plaintiff with legible copies of releasable records or else to state that no better copies exist); see also McDonnell v. United States, slip op. at 60-61 n.21 (FOIA requester should "receive the best possible reproductions of the documents to which he is entitled").

[85] 5 U.S.C. § 552(a)(6)(C); see, e.g., Spannaus v. United States Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987); see also Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978); FOIA Update, Jan. 1983, at 6 (superseded in part).

[86] Oglesby v. United States Dep't of the Army, 920 F.2d at 61-65; accord McDonnell v. United States, slip op. at 59 (dismissal of claim proper where plaintiff filed suit before filing administrative appeal of denial received after exhaustion of ten-day period); see also FOIA Update, Spring 1991, at 3-4 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision").

administrative remedies, see Litigation Considerations, below.)

Once in court, if an agency can show that its failure to meet the statutory time limits resulted from "exceptional circumstances" and that it is applying "due diligence" in processing the request, the agency may be allowed additional time to complete its processing and possibly to prepare a Vaughn Index as well.[87] In this connection, the need to process an extremely large volume of requests has been held to constitute "exceptional circumstances," and the commitment of large amounts of resources to process requests on a first-come, first-served basis has been held to constitute "due diligence" under this subsection.[88] (For a discussion of the litigation aspects of "exceptional circumstances," see the "Open America Stays" subsection of Litigation Considerations, below.)

Finally, several miscellaneous characteristics of the FOIA should also be noted. First, it applies only to records, not to tangible, evidentiary objects.[89] Also, agencies are not required to create records in order to respond to FOIA requests.[90] Nor are agencies required to answer questions posed as FOIA re-

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[87] 5 U.S.C. § 552(a)(6)(C); see also FOIA Update, Fall 1988, at 5.

[88] See Open America v. Watergate Special Prosecution Force, 547 F.2d at 615-16; see also Caifano v. Wampler, 588 F. Supp. 1392, 1394-95 (N.D. Ill. 1984) (agency directed to "continue to work diligently and expeditiously in a good faith manner to respond to plaintiff's requests"); see generally FOIA Update, Spring 1992, at 8-10 (discussing agency difficulties with FOIA time limits and administrative backlogs); FOIA Update, Winter 1990, at 1-2 (discussing effects of budgetary constraints upon agency FOIA operations).

[89] Nichols v. United States, 325 F. Supp. 130, 135-36 (D. Kan. 1971) (archival exhibits consisting of guns, bullets and clothing pertaining to assassination of President Kennedy held not "records"), aff'd on other grounds, 460 F.2d 671 (10th Cir.), cert. denied, 409 U.S. 966 (1972); see also FOIA Update, Winter 1993, at 1 (discussing implementation of President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 note).

[90] See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. at 162 (agency not required to produce or create explanatory materials); Yeager v. DEA, 678 F.2d at 321-23 (agency not obligated to restructure records for release); Krohn v. Department of Justice, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (an agency "cannot be compelled to create the [intermediary records] necessary to produce" the information sought); see also FOIA Update, Winter 1984, at 5. But see McDonnell v. United States, slip op. at 26 (suggesting, in dictum, that agency might be compelled to create translation of any disclosable encoded information); cf. International Diatomite Producers Ass'n v. United States Social Sec. Admin., slip op. at 13-14 (agency given choice of compiling responsive list or redacting existing lists containing responsive information).

quests.[91] It likewise is well recognized that the FOIA does not provide for limited disclosure; rather, it "speaks in terms of disclosure and nondisclosure. It does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents."[92] Moreover, it has been held that requesters cannot compel agencies to make automatic releases of records as they are created.[93]

There also is no damage remedy available to FOIA requesters for nondisclosure.[94] Furthermore, agencies are not required to seek the return of records wrongfully removed from their possession,[95] or to seek the delivery of records held by private entities.[96] Lastly, the District Court for the District of

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[91] See, e.g., Zemansky v. EPA, 767 F.2d at 574; DiViaio v. Kelley, 571 F.2d 538, 542-43 (10th Cir. 1978); Patton v. United States R.R. Retirement Bd., No. ST-C-91-04-MU, slip op. at 3 (W.D.N.C. Apr. 26, 1991) (The FOIA "provides a means for access to existing documents and is not a way to interrogate an agency."), aff'd, 940 F.2d 652 (4th Cir. 1991) (table cite); Astley v. Lawson, slip op. at 5 (agency not required to respond to requests for answers to questions); Priest v. IRS, No. C88-20785, slip op. at 7-8 (N.D. Cal. Jan. 10, 1990) (agency not required to create explanatory material in response to FOIA request); Hudgins v. IRS, 620 F. Supp. at 21 ("FOIA creates only a right of access to records, not a right to personal services."); see also FOIA Update, Winter 1984, at 5.

[92] Julian v. United States Dep't of Justice, 806 F.2d 1411, 1419 n.7 (9th Cir. 1986), aff'd, 486 U.S. 1 (1988); Berry v. Department of Justice, 733 F.2d 1343, 1355 n.19 (9th Cir. 1984); see also Seawell, Dalton, Hughes & Timms v. Export-Import Bank of the United States, No. 84-241-N, slip op. at 2 (E.D. Va. July 27, 1984) (no "middle ground between disclosure and nondisclosure").

[93] See Mandel Grunfeld & Herrick v. United States Customs Serv., 709 F.2d 41, 43 (11th Cir. 1983) (plaintiff not entitled to automatic mailing of materials as they are updated); Howard v. Secretary of the Air Force, No. SA-89-CA-1008, slip op. at 6 (W.D. Tex. Oct. 2, 1991) (plaintiff's request for records on continuing basis would "create an enormous burden, both in time and taxpayers' money"); see also FOIA Update, Spring 1985, at 6.

[94] See, e.g., Lanter v. FBI, No. CIV-93-34, slip op. at 2 (W.D. Okla. July 30, 1993) (appeal pending); Lufkin v. Director, Executive Office for United States Attorneys, No. 85-1959, slip op. at 1 (D.D.C. Mar. 10, 1987); Daniels v. St. Louis VA Regional Office, 561 F. Supp. 250, 252 (E.D. Mo. 1983); King v. Califano, 471 F. Supp. 180, 182 (D.D.C. 1979).

[95] Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 151-55 (1980).

[96] Forsham v. Harris, 445 U.S. at 182-86 (data generated and held by federal grantee); Rush Franklin Publishing, Inc. v. NASA, slip op. at 9-10 (mailing list generated and held by federal contractor); Conservation Law Found. v. Department of the Air Force, No. 85-4377, slip op. at 8 (D. Mass. June 6, 1986) (computer program generated and held by federal contractor); cf. United States v. Napper, 887 F.2d 1528, 1530 (11th Cir. 1989) (FBI en-

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Columbia has held, in the first such decision, that under some circumstances a FOIA claim may not be extinguished by the death of a requester.[97]

EXEMPTION 1

Exemption 1 of the FOIA protects from disclosure national security information concerning the national defense or foreign policy, provided that it has been properly classified in accordance with the substantive and procedural requirements of an executive order.[1] The applicable executive order currently in effect is Executive Order No. 12,356,[2] which replaced predecessor Executive Order No. 12,065 on August 1, 1982.

It should be noted, however, that earlier this year President Clinton established an interagency task force to draft a proposed executive order on national security information to supersede Executive Order No. 12,356.[3] The President has directed this task force to submit its draft to him through the National Security Council staff by November 30, 1993, for formal coordination.[4] The issuance of a new executive order, of course, will have a significant impact upon the implementation of Exemption 1 in the future. Meanwhile, Exemption 1's proper application continues to be governed by the provisions of Executive

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[96](...continued)
titled to return of documents loaned to city law enforcement officials, notwithstanding fact that copies of some documents had been disclosed) (non-FOIA case). But see also Cal-Almond, Inc. v. United States Dep't of Agric., No. 89-574, slip op. at 3-4 (E.D. Cal. Mar. 17, 1993) (agency ordered to reacquire records which were returned mistakenly to submitter upon closing of administrative appeal).

[97] D'Aleo v. Department of the Navy, No. 89-2347, slip op. at 3 (D.D.C. Mar. 21, 1991) (allowing decedent's executrix to be substituted as plaintiff). But see Hayles v. United States Dep't of Justice, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (case dismissed upon death of plaintiff where no timely motion for substitution filed).

[1] 5 U.S.C. § 552(b)(1) (1988).

[2] 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988); see also FOIA Update, June 1982, at 6-7.

[3] See Presidential Review Directive 29 (Apr. 26, 1993) (stating that purpose of effort to review present classification and safeguarding systems is "to ensure that they are in line with the reality of the current, rather than the past, threat potential," given end of Cold War).

[4] Id. at 1-2 (matters to be addressed in review include identifying steps that can be taken "to avoid excessive classification[,] . . . to declassify information as quickly as possible . . . [and] to declassify . . . the large amounts of classified information that currently exist in Government archives").

Order No. 12,356.[5]

In order to appreciate the evolution of Exemption 1, it is necessary to review briefly the early decisions construing it and its legislative history. In 1973, the Supreme Court in EPA v. Mink[6] held that records classified under proper procedures were exempt from disclosure per se, without any further judicial review, thereby obviating the need for in camera review of information withheld under this exemption.[7] Responding in large part to the thrust of that decision, Congress amended the FOIA in 1974 to provide expressly for de novo review by the courts and for in camera review of documents, including classified documents, where appropriate.[8] In so doing, Congress apparently sought to ensure that national security records are properly classified by agencies and that reviewing courts remain cognizant of their authority to verify the correctness of agency classification determinations.[9]

Standard of Review

Numerous litigants thereafter challenged the sufficiency of agency affidavits in Exemption 1 cases, requesting in camera review by the courts and hoping to obtain disclosure of challenged documents. Nevertheless, courts initially upheld agency classification decisions in reliance upon agency affidavits, as a matter of routine, in the absence of evidence of bad faith on the part of an agency.[10] In 1978, however, the Court of Appeals for the District of Columbia Circuit departed somewhat from such routine reliance on agency affidavits, prescribing in camera review to facilitate full de novo determinations of Exemption 1 claims, even where there was no showing of bad faith on the part of the agency.[11] This decision nevertheless recognized that the courts should "first 'accord substantial weight to an agency's affidavit concerning the details of the

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[5] See, e.g., Bonner v. United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (judicial review of agency withholdings "evaluated" as of time of agency's determination, not time of judicial proceedings); King v. United States Dep't of Justice, 830 F.2d 210, 215-17 (D.C. Cir. 1987) (judicial assessment of Exemption 1 excisions is based upon executive order in effect at time "agency's ultimate classification decision . . . actually made"); Lesar v. United States Dep't of Justice, 636 F.2d 472, 480 (D.C. Cir. 1980) (same).

[6] 410 U.S. 73 (1973).

[7] Id. at 84.

[8] See 5 U.S.C. § 552(a)(4)(B).

[9] See H.R. Rep. No. 876, 93d Cong., 2d Sess. 7-8 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6272-73, and in House Comm. on Gov't Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts and Other Documents 121, 127-28 (1975).

[10] See, e.g., Weissman v. CIA, 565 F.2d 692, 698 (D.C. Cir. 1977).

[11] Ray v. Turner, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978).

classified status of the disputed record.'"[12]

The D.C. Circuit further refined the appropriate standard for judicial review of national security claims under Exemption 1 (or under Exemption 3, in conjunction with certain national security protection statutes), finding that summary judgment is entirely proper if an agency's affidavits are reasonably specific and there is no evidence of bad faith.[13] Rather than conduct a detailed inquiry, the court deferred to the expert opinion of the agency, noting that judges "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case."[14] This review standard has been reaffirmed by the D.C. Circuit on a number of occasions,[15] and it has been

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[12] Id. at 1194 (quoting legislative history).

[13] Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); see also Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992) (Exemption 3); cf. Center for Nat'l Sec. Studies v. Office of Indep. Counsel, No. 91-1691, slip op. at 3-4 (D.D.C. Mar. 2, 1993) (discovery denied in FOIA lawsuit involving Exemption 1 because affidavits "relatively detailed, . . . nonconclusory and submitted in good faith"). But see Wiener v. FBI, 943 F.2d 972, 978-79 (9th Cir. 1991) (rejecting as inadequate agency justifications contained in coded Vaughn affidavits, based upon view that they consist of "boilerplate" explanations not "tailored" to particular information being withheld pursuant to Exemption 1), cert. denied, 112 S. Ct. 3013 (1992); Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 n.12 (D.C. Cir. 1990) (noting degree of specificity required in public Vaughn affidavit in Exemption 1 case, especially with regard to agency's obligation to segregate and release nonexempt material); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (ordering new Vaughn affidavits for all disputed documents, finding that to rule on "a few" sufficient affidavits would be "waste of time" and "unnecessary splitting of issues"), subsequent decision, No. C89-1843, slip op. at 22-23 (N.D. Cal. June 4, 1993) (upholding Exemption 1 withholdings for most of documents at issue given more detailed affidavits, but ordering in camera inspection and additional affidavits for several remaining documents because excisions on them were still inadequately justified by agency).

[14] 629 F.2d at 148; see also Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (emphasizing deference due agency's classification judgment).

[15] See, e.g., Krikorian v. Department of State, 984 F.2d 461, 464 (D.C. Cir. 1993); King v. United States Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987) ("the court owes substantial weight to detailed agency explanations in the national security context"); Goldberg v. United States Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987), cert. denied, 485 U.S. 904 (1988); see also Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 802-03 (D.D.C. 1992) (rejecting plaintiff's attack that coded Vaughn Index constituted inadequate "boilerplate," especially given "nature of underlying materials" which purportedly concern assassination of prime minister of friendly country) (appeal

(continued...)

adopted by courts in other circuits as well.[16]

Indeed, if an agency affidavit passes muster under this standard, in camera review may be inappropriate because substantial weight must be accorded that affidavit.[17] In one case, the Court of Appeals for the Seventh Circuit ana-

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[15](...continued)
pending); National Sec. Archive v. Office of Indep. Counsel, No. 89-2308, slip op. at 6-7 (D.D.C. Aug. 28, 1992) (finding adequate Vaughn Index which includes copies of redacted pages and "topic codes" explaining FOIA exemptions applied to each deletion when "read in conjunction with agency declarations"); Washington Post v. DOD, 766 F. Supp. 1, 6-7 (D.D.C. 1991) (judicial review of agency's classification decisions should be "quite deferential"; national security threat of disclosure of working files of Iranian hostage rescue attempt "evident even to a judicial eye"); National Sec. Archive v. FBI, 759 F. Supp. 872, 875 (D.D.C. 1991) (government's burden to demonstrate proper withholding of material "relatively light" in Exemption 1 context because court is required to "accord substantial weight to determination of [agency] officials"); cf. Department of the Navy v. Egan, 484 U.S. 518, 529-30 (1988) (deference to agency expertise in granting of security clearances) (non-FOIA case); Mangino v. Department of the Army, No. 91-2318, slip op. at 17-18 (D. Kan. Mar. 30, 1993) (similar deference regarding revocation of security clearance) (non-FOIA case).

[16] See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 23 (3d Cir. Sept. 21, 1993) (summary judgment appropriate where agency's affidavits reasonably specific and not controverted by contrary evidence or showing of bad faith) (to be published); Maynard v. CIA, 986 F.2d 547, 555-56 & n.7 (1st Cir. 1993) ("substantial deference" so long as withheld information logically falls into exemption category cited and there exists no evidence of agency "bad faith"); Bowers v. United States Dep't of Justice, 930 F.2d 350, 357 (4th Cir.) ("What fact or bit of information may compromise national security is best left to the intelligence experts."), cert. denied, 112 S. Ct. 308 (1991); Patterson v. FBI, 893 F.2d 595, 601 (3d Cir. 1990) ("[C]ourts are expected to accord 'substantial weight' to the agency's affidavit."), cert. denied, 498 U.S. 812 (1990); see also Jones v. FBI, No. C77-1001, slip op. at 8-9 (N.D. Ohio Aug. 12, 1992) (rejecting plaintiff's argument that agency must demonstrate that national security source actually provided classified information because "to do so would violate . . . principle of affording substantial weight to . . . agency's expert opinion") (appeal pending); cf. Hunt v. CIA, 981 F.2d at 1119 (similar deference in Exemption 3 case involving national security); Knight v. CIA, 872 F.2d 660, 664 (5th Cir. 1989) (same), cert. denied, 494 U.S. 1004 (1990).

[17] See, e.g., Doherty v. United States Dep't of Justice, 775 F.2d 49, 53 (2d Cir. 1985) ("the court should restrain its discretion to order in camera review"); Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979) ("When the agency meets its burden by means of affidavits, in camera review is neither necessary nor appropriate."), cert. denied, 446 U.S. 937 (1980); Carney v. CIA, No. 88-602, slip op. at 48-51 (C.D. Cal. Feb. 28, 1991) (magistrate's recommendation) (in camera review "not required, necessary, or appropriate" because agency's affidavits sufficient and "entitled to substantial deference"), adopted (C.D.
(continued...)

lyzed the legislative history of the 1974 FOIA Amendments and went so far as to conclude that "Congress did not intend that the courts would make a true de novo review of classified documents, that is, a fresh determination of the legitimacy of each classified document."[18] It is also noteworthy that the only Exemption 1 FOIA decision to find agency "bad faith,"[19] which initially held that certain CIA procedural shortcomings amounted to "bad faith" on the part of the agency, was subsequently vacated on panel rehearing.[20]

Deference to Agency Expertise

While the standard of judicial review is often expressed in different ways, courts have generally deferred to agency expertise in national security cases.[21]

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[17](...continued)
Cal. Apr. 26, 1991); King v. United States Dep't of Justice, 586 F. Supp. 286, 290 (D.D.C. 1983) (in camera review last resort), aff'd in part & rev'd in part on other grounds, 830 F.2d 210 (D.C. Cir. 1987); cf. Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992) (district court did not abuse its discretion by refusing to review documents in camera--despite small number--because agency's affidavits found sufficiently specific to meet required standards for proper withholding). But see, e.g., Patterson v. FBI, 893 F.2d at 599 (in camera review of two documents appropriate where agency description of records was insufficient to permit meaningful review and to verify good faith of agency in conducting its investigation); Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980) (conclusory affidavit by agency requires remand to district court for in camera inspection of 15-page document); Moore v. FBI, No. 83-1541, slip op. at 7 (D.D.C. Mar. 9, 1984) (in camera review particularly appropriate where only small volume of documents involved and government makes proffer), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite); cf. Wiener v. FBI, 943 F.2d at 979 & n.9 (in camera review by district court cannot "replace" requirement for sufficient Vaughn Index and can only "supplement" agency's justifications contained in affidavits); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. at 1301 (applying Wiener standard).

[18] Stein v. Department of Justice, 662 F.2d 1245, 1253 (7th Cir. 1981).

[19] McGehee v. CIA, 697 F.2d 1095, 1113 (D.C. Cir. 1983).

[20] McGehee v. CIA, 711 F.2d 1076, 1077 (D.C. Cir. 1983); see also Washington Post Co. v. DOD, No. 84-2949, slip op. at 9 (D.D.C. Feb. 25, 1987) (addition of second classification category at time of litigation "does not create an inference of 'bad faith' concerning the processing of plaintiff's request or otherwise implicating the affiant's credibility"); cf. Gilmore v. NSA, No. C92-3646, slip op. at 21-22 (N.D. Cal. Apr. 30, 1993) (fact that agency subsequently released some material initially withheld pursuant to Exemption 1 not any indication of "bad faith"); Center for Nat'l Sec. Studies v. Office of Indep. Counsel, slip op. at 5-6 (same) (discovery denied in FOIA litigation).

[21] See, e.g., Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1993); Bowers v. United States Dep't of Justice, 930 F.2d 350, 357 (4th Cir.), cert. denied, 112 S. Ct. 308 (1991); Doherty v. United States Dep't of Justice, 775 F.2d 49, (continued...)

Accordingly, courts are usually reluctant to substitute their judgment in place of the agency's "unique insights" in the areas of national defense and foreign relations.[22] Courts have demonstrated this general deference to agency expertise by according little or no weight to opinions of persons other than the agency classification authority when reviewing the propriety of agency classification.[23]

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[21](...continued)
52 (2d Cir. 1985); Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984); Taylor v. Department of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (classification affidavits entitled to "the utmost deference") (reversing district court disclosure order).

[22] See, e.g., Miller v. United States Dep't of State, 779 F.2d 1378, 1387 (8th Cir. 1985); see also Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) (court "not in a position to 'second-guess'" agency's determination regarding need for continued classification of material); Krikorian v. Department of State, 984 F.2d 461, 464-65 (D.C. Cir. 1993) (acknowledging agency's "unique insights" in areas of national defense and foreign relations); Holland v. CIA, No. 91-1233, slip op. at 15-16 (D.D.C. Aug. 31, 1992) (deferring to judgment of agency's designated classification officer as to possible harm; rejecting plaintiff's claim that she lacks subject-matter expertise); Willens v. NSC, 726 F. Supp. 325, 326-27 (D.D.C. 1989) (court cannot second-guess agency's national security determinations where they are "credible and have a rational basis"); Washington Post Co. v. DOD, No. 84-2949, slip op. at 13-14 (D.D.C. Feb. 25, 1987) (court need not agree with government's evaluation of harm; court's task is to determine whether agency judgment is "plausible, reasonable, and exercised in good faith"). But see also King v. United States Dep't of Justice, 830 F.2d 210, 226 (D.C. Cir. 1987) (where executive order presumed declassification of information over 20 years old and agency merely indicated procedural compliance with order, trial court erred in deferring to agency's judgment that information more than 35 years old remained classified); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 561 (S.D.N.Y. 1989) (such deference does not give agency "carte blanche" to withhold responsive documents without "valid and thorough affidavit"), subsequent decision, No. 87-Civ-1115, slip op. at 1-2 (S.D.N.Y. June 7, 1990) (after in camera review of certain documents and classified CIA Vaughn affidavit, Exemption 1 withholdings upheld).

[23] See, e.g., Van Atta v. Defense Intelligence Agency, No. 87-1508, slip op. at 2-4 (D.D.C. July 6, 1988) (rejecting opinion of requester who claimed that willingness of foreign diplomat to discuss issue indicated no expectation of confidentiality); Washington Post Co. v. DOD, slip op. at 14 (rejecting opinion of U.S. Senator who read document in official capacity as member of Committee on Foreign Relations); cf. Lawyers Alliance for Nuclear Arms Control v. Department of Energy, No. 88-CV-7635, slip op. at 1-5 (E.D. Pa. Dec. 18, 1991) (upholding Exemption 1 claim for Joint Verification Agreement records where requester provided no "admissible evidence" that officials of Soviet Union consented to release of requested nuclear test results); Alyeska Pipeline Serv. Co. v. EPA, 856 F.2d 309, 315 (D.C. Cir. 1988) (no "special deference to agency beyond Exemption 1 context"). But cf. Washington Post v. DOD,
(continued...)

Persons whose opinions have been rejected by the courts in this context include a former ambassador who originated some of the records at issue,[24] a retired admiral,[25] a former CIA agent[26] and a retired CIA staff historian.[27]

In Camera Submissions

There are numerous instances in which courts have permitted agencies to submit explanatory in camera affidavits in order to protect certain national security information which could not be discussed in a public affidavit.[28] It is entirely clear, though, that agencies taking such a special step are under a duty to "create as complete a public record as is possible" before so doing.[29]

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[23](...continued)
766 F. Supp. 1, 13-14 (D.D.C. 1991) ("non-official releases" contained in books by participants involved in Iranian hostage rescue attempt--including ground assault commander and former President Carter--have "good deal of reliability" and require government to explain "how official disclosure" of code names "at this time would damage national security").

[24] Rush v. Department of State, No. 88-8245, slip op. at 17-18 (S.D. Fla. Sept. 12, 1990) (magistrate's recommendation), adopted, 748 F. Supp. 1548, 1554 (S.D. Fla. 1990); cf. Goldberg v. United States Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987) (classification officer's determination accepted even though more than 100 ambassadors did not initially classify information), cert. denied, 485 U.S. 904 (1988).

[25] Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989).

[26] Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982); Liechty v. CIA, No. 79-2064, slip op. at 6 (D.D.C. Apr. 16, 1981).

[27] Pfeiffer v. CIA, 721 F. Supp. 337, 340-41 (D.D.C. 1989); accord Pfeiffer v. CIA, No. 91-736, slip op. at 10 n.2 (D.D.C. Sept. 28, 1992) (non-FOIA case).

[28] See, e.g., Patterson v. FBI, 893 F.2d 595, 599-600 (3d Cir. 1990), cert. denied, 498 U.S. 812 (1990); Simmons v. United States Dep't of Justice, 796 F.2d 709, 711 (4th Cir. 1986); Ingle v. Department of Justice, 698 F.2d 259, 264 (6th Cir. 1983) (in camera review should be secondary to testimony or affidavits); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); Stein v. Department of Justice, 662 F.2d 1245, 1255-56 (7th Cir. 1981); Wilson v. Department of Justice, No. 87-2415, slip op. at 3 (D.D.C. June 30, 1993) (agency must submit in camera affidavit to justify Exemption 1 withholdings as to certain documents and describe "with greater specificity . . . reason[s] for their nondisclosure").

[29] Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976); accord Patterson v. FBI, 893 F.2d at 600; Simmons v. United States Dep't of Justice, 796 F.2d at 710; National Sec. Archive v. Office of Indep. Counsel, No. 89-2308, slip op. at 4-5 (D.D.C. Aug. 28, 1992) (applying Phillippi standards, refusing (continued...)

In this regard, it is reasonably well settled that counsel for plaintiffs are not entitled to participate in such in camera proceedings.[30] Several years ago, however, one court took the unprecedented step of appointing a special master to review and categorize a large volume of classified records.[31] In other instances involving large numbers of records, courts have on occasion ordered agencies to submit samples of the documents at issue for in camera review.[32]

In a decision which highlights some of the difficulties of Exemption 1 liti-

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[29](...continued)
to review in camera affidavits until agency "has stated publicly 'in as much detail as possible' . . . reasons for nondisclosure"); Green v. United States Dep't of State, No. 85-504, slip op. at 17-18 (D.D.C. Apr. 17, 1990) (classification of documents upheld after reviewing in camera submissions in conjunction with public record); Moessmer v. CIA, No. 86-948, slip op. at 9-11 (E.D. Mo. Feb. 17, 1987) (in camera review appropriate when record contains contradictory evidence), aff'd, 871 F.2d 1092 (6th Cir. 1988) (table cite). But see Public Citizen v. Department of State, No. 91-746, slip op. at 5-6 (D.D.C. Aug. 26, 1991) (ordering in camera review of records upon basis that public testimony of ambassador may have "waived" Exemption 1 protection).

[30] See Salisbury v. United States, 690 F.2d at 973 n.3; Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982); Hayden v. NSA/Cent. Sec. Serv., 608 F.2d 1381, 1385-86 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Martin v. United States Dep't of Justice, No. 83-2674, slip op. at 1 (W.D. Pa. June 5, 1986) (agency required to release unclassified portions of transcript of in camera testimony), aff'd, 800 F.2d 1135 (3d Cir. 1986) (table cite); see also Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983) (plaintiff's counsel not permitted to participate in in camera review of documents arguably covered by state secrets privilege); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (no reversible error where court not only reviewed affidavit and documents in camera, but also received authenticating testimony ex parte); cf. Arieff v. United States Dep't of the Navy, 712 F.2d 1462, 1470-71 & n.2 (D.C. Cir. 1983) (no participation by plaintiff's counsel permitted even where information withheld was personal privacy information). But cf. Lederle Lab. v. HHS, No. 88-249, slip op. at 2-3 (D.D.C. May 2, 1988) (restrictive protective order granted in Exemption 4 case permitting counsel for requester to review contested business information).

[31] See Washington Post Co. v. DOD, No. 84-3400, slip op. at 2 (D.D.C. Jan. 15, 1988), petition for mandamus denied sub nom. In re DOD, 848 F.2d 232 (D.C. Cir. 1988); cf. Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1301 (N.D. Cal. 1992) (court "will not hesitate" to appoint special master to assist in in camera review of disputed documents if agency fails to submit adequate Vaughn affidavits).

[32] See, e.g., Wilson v. CIA, No. 89-3356, slip op. at 5-6 (D.D.C. Oct. 15, 1991) (ordering in camera submission of "sample" of 50 documents because "neither necessary nor practicable" for court to review all 1000 processed records).

gation practice, the Court of Appeals for the Fourth Circuit issued a writ of mandamus which required that court personnel who would have access to classified materials submitted in camera in an Exemption 1 case obtain security clearances prior to the submission of any such materials to the court.[33] On remand, the district court judge reviewed the disputed documents entirely on his own.[34] Consistent with the special precautions taken by courts in Exemption 1 cases, the government also has been ordered to provide a court reporter with the requisite security clearances to transcribe in camera proceedings, in order "to establish a complete record for meaningful appellate review."[35]

Agencies have in other cases been compelled to submit in camera affidavits where disclosure in a public affidavit would vitiate the very protection afforded by Exemption 1.[36] Such a procedure is sometimes employed where even the confirmation or denial of the existence of records at issue would pose

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[33] In re United States Dep't of Justice, No. 87-1205, slip op. at 4-5 (4th Cir. Apr. 7, 1988).

[34] See Bowers v. United States Dep't of Justice, No. C-C-86-336, slip op. at 1 (W.D.N.C. Mar. 9, 1990).

[35] Willens v. NSC, 720 F. Supp. 15, 16 (D.D.C. 1989); cf. Physicians for Social Responsibility, Inc. v. United States Dep't of Justice, No. 85-169, slip op. at 3-4 (D.D.C. Aug. 25, 1985) (transcript of in camera proceedings--from which plaintiff's counsel excluded--placed under seal). But cf. Pollard v. FBI, 705 F.2d at 1154 (no reversible error where no transcript made of ex parte testimony of FBI agent who merely "authenticated and described" documents at issue).

[36] See, e.g., Green v. United States Dep't of State, slip op. at 17-18 (public Vaughn affidavit containing additional information could "well have the effect of prematurely letting the cat out of the bag"); cf. Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993) ("[A] more detailed affidavit could have revealed the very intelligence sources and methods the CIA wished to keep secret."); Gilmore v. NSA, No. C92-3646, slip op. at 14-15 (N.D. Cal. Apr. 30, 1993) (agency has provided as much information as possible in public affidavit without "thwarting" purpose of Exemption 1); Center for Nat'l Sec. Studies v. Office of Indep. Counsel, No. 91-1691, slip op. at 4 (D.D.C. Mar. 2, 1993) ("In the national security context, the release of detailed information through discovery may render the FOIA exemption meaningless and compromise intelligence sources and methods."); Varelli v. FBI, No. 88-1865, slip op. at 6 (D.D.C. Oct. 4, 1991) ("[T]oo much detail [in public affidavit] defeats the claim of the exemption in the national security area. Release of too much information would result in the exact harm sought to be avoided by [its] assertion."); Krikorian v. Department of State, No. 88-3419, slip op. at 6-7 (D.D.C. Dec. 19, 1990) (agency's public affidavits sufficient because requiring more detailed descriptions of substance of information would give foreign governments and confidential intelligence sources "reason to pause" before offering advice or useful information to agency officials in future), aff'd in pertinent part, 984 F.2d 461, 464-65 (D.C. Cir. 1993).

a threat to the national security.[37] (For a further discussion of in camera inspection, see Litigation Considerations, below.)

Rejection of Classification Claims

Prior to 1986, no appellate court had ever upheld, on the substantive merits of the case, a decision to reject an agency's classification claim. In 1980, the Court of Appeals for the District of Columbia Circuit let stand, but on entirely procedural grounds, a district court determination that the CIA's affidavits were general and conclusory and that its Exemption 1 claims had to be rejected as "overly broad."[38] Moreover, that portion of the D.C. Circuit's decision was subsequently vacated by the Supreme Court.[39] Several years later, in an unprecedented and exceptionally complex case, a district court ordered the disclosure of classified records belatedly determined by it to be within the scope of the request and therefore not addressed in the agency's classification affidavits.[40] The government never had the opportunity to obtain appellate review of the merits of this adverse decision because the records were disclosed after stays pending appeal were denied, successively, by the district court, the Court of Appeals for the Ninth Circuit, and even by the Supreme Court.[41] In addition, the district court ordered the disclosure of certain other segments of classified information because it was "convinced [that] disclosure

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[37] Phillippi v. CIA, 546 F.2d at 1013 (request for documents pertaining to Glomar Explorer submarine-retrieval ship; consequently, "neither confirm nor deny" response now known as "Glomar" denial or "Glomarization"); see, e.g., Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984) (request for any record reflecting any attempt by western countries to overthrow Albanian government); Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (request for any record revealing any covert CIA connection with University of California); Peterzell v. CIA, No. 85-2685, slip op. at 2 (D.D.C. July 11, 1986) (request for records describing CIA covert paramilitary operations in Nicaragua); Marrera v. United States Dep't of Justice, 622 F. Supp. 51, 53-54 (D.D.C. 1985) (request for any record which would reveal whether requester was target of surveillance pursuant to Foreign Intelligence Surveillance Act); Kapsa v. CIA, No. C-2-78-1062, slip op. at 7-8 (S.D. Ohio Mar. 6, 1985) (request for any record revealing any covert CIA connection with Ohio State University); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 26 (Dec. 1987); FOIA Update, Spring 1983, at 5.

[38] Holy Spirit Ass'n v. CIA, 636 F.2d 838, 845 (D.C. Cir. 1980).

[39] See CIA v. Holy Spirit Ass'n, 455 U.S. 997 (1982); see also FOIA Update, March 1982, at 5.

[40] Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 16 (N.D. Cal. Mar. 27, 1985); see also Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1517-18, 1530-31 (N.D. Cal. 1984).

[41] See Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 4-6 (N.D. Cal. June 14, 1985), stay denied, No. 85-1918 (9th Cir. July 18, 1985), stay denied, No. A-84 (U.S. July 31, 1985) (Rehnquist, Circuit Justice) (undocketed order).

of this information poses no threat to national security."[42] The district court did, however, grant a stay of this aspect of its disclosure order so the government could take an appeal.[43] Ultimately, the case was settled with the government being permitted to withhold this classified information.

In 1986, the Court of Appeals for the Second Circuit upheld a district court disclosure order in a case in which the district court found that the affidavit submitted by the FBI inadequately described the withheld documents and was unconvincing as to any potential harm which would result from disclosure.[44] This finding, coupled with in camera inspection of the documents by the district court, led the court of appeals to conclude that "it would be inappropriate . . . to give more deference to the FBI's characterization of the information than did the trial court."[45] The case was subsequently settled, however, and the plaintiff withdrew his request for the classified records ordered disclosed in exchange for the government's agreement not to seek to vacate the Second Circuit's opinion in the Supreme Court. The precedential value of the Second Circuit's decision is therefore questionable in light of the extraordinary procedural and factual nature of the case.

Also of note in this regard is a district court decision in which it required in camera affidavits on all records, most of which were classified, "not because the agencies' good faith had been controverted, but 'in order that the Court may be able to monitor the agencies' determinations'"; ultimately, the district court did order some classified information disclosed.[46] However, the D.C. Circuit, on appeal, remanded the case for submission of briefs in light of the Supreme Court's decision in CIA v. Sims.[47] On remand, the district court found most of the information to be protected under Sims, but it affirmed its disclosure order with regard to some of the information that the CIA had sought to protect under Exemptions 1 and 3.[48] The D.C. Circuit subsequently reversed that part of the district court's order on remand that still required disclosure of certain CIA information, though it rested its decision upon Exemption 3

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[42] Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 8 (N.D. Cal. Mar. 27, 1985).

[43] Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 6 (N.D. Cal. June 14, 1985).

[44] Donovan v. FBI, 806 F.2d 55 (2d Cir. 1986); see also Donovan v. FBI, 625 F. Supp. 808, 811 (S.D.N.Y. 1986).

[45] 806 F.2d at 60.

[46] Fitzgibbon v. CIA, 578 F. Supp. 704, 709 (D.D.C. 1983), motion for reconsideration granted in part, No. 79-956 (D.D.C. July 5, 1984).

[47] 471 U.S. 159 (1985); see Fitzgibbon v. CIA, No. 84-5632 (D.C. Cir. Mar. 13, 1986).

[48] Fitzgibbon v. CIA, No. 79-956, slip op. at 14-15, 17-18 (D.D.C. May 19, 1989).

grounds alone.[49] It concluded that "whatever merits" there may have been to support disclosure of the information at issue in the case had been "vaporized by the unequivocal sweep of the Supreme Court's decision in Sims."[50]

Two significant D.C. Circuit decisions, each of which reversed a district court disclosure order, strongly reaffirmed the deference that is due an agency's classification judgment. In the first, the D.C. Circuit overturned a lower court conclusion that the existence of information in the public domain similar to the information at issue warranted the disclosure of that classified information.[51] Emphasizing that the least "bit" of classified information deserves protection, it observed that the "district court's finding . . . reveals a basic misunderstanding of the information withheld," and that the "district court did not give the required 'substantial weight' to the [agency's] uncontradicted affidavits."[52]

Similarly, in the second case, the D.C. Circuit vacated a district court determination that public statements by senior executive and legislative branch officials constituted sufficient official acknowledgment of "covert action" by the government against Nicaragua to warrant release of the sensitive documents at issue, specifically chastised the lower court for "refusing to consider in camera the confidential declaration and confidential memorandum of law offered by the government," and remanded the case for a more careful consideration of the government's classification judgment.[53] On remand, the district court found that the "Government's general acknowledgment of covert activities . . . is insufficient to require release" of its records.[54]

In a more recent district court case, the full Supreme Court has taken the extraordinary step of staying a district court disclosure order of classified information pending a full review of the decision by the Ninth Circuit.[55] Rejecting

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[49] Fitzgibbon v. CIA, 911 F.2d 755, 757, 760, 764 (D.C. Cir. 1990).

[50] Id. at 760; see also Siminoski v. FBI, No. 83-6499, slip op. at 14-18 (C.D. Cal. Jan. 16, 1990) (rejecting magistrate's recommendation to disclose classified information).

[51] Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985).

[52] Id. at 607 & n.3; see also Bowers v. United States Dep't of Justice, 930 F.2d 350, 352, 354-55 (4th Cir.) (reversing district court order to disclose classified information because lower court was "clearly erroneous" in not applying proper standards in review of records and in not giving any weight to detailed explanations of FBI as to why undisclosed information in its counterintelligence files should be withheld), cert. denied, 112 S. Ct. 308 (1991).

[53] Peterzell v. Department of State, No. 84-5805, slip op. at 2 (D.C. Cir. Apr. 2, 1985).

[54] Peterzell v. Department of State, No. 82-2853, slip op. at 3 (D.D.C. Sept. 20, 1985).

[55] Rosenfeld v. United States Dep't of Justice, 761 F. Supp. 1440, 1451 (continued...)

an FBI Exemption 1 claim, the district court judge ignored the recommendation of a magistrate who had concluded that the information was properly classified.[56] In so ruling, the district court grounded its decision on the supposition that the information involved was "likely to have been public knowledge."[57]

"Public Domain" Information

Several courts also have had occasion to consider whether agencies have a duty to disclose classified information which has purportedly found its way into the public domain. In this regard, it has been held that, in asserting a claim of prior public disclosure, a FOIA plaintiff bears "the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld."[58] Accordingly, Exemption 1 claims should not be undermined by mere allegations that classified information has been leaked to the press or otherwise made available to members of the public. Courts have carefully recognized the distinction between a bona fide declassification action or official release and unsubstantiated speculation lacking official confirmation,

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[55](...continued)
(N.D. Cal. 1991), emergency stay denied on jurisdictional grounds, No. 91-15854 (9th Cir. June 12, 1991), stay pending appeal granted, 111 S. Ct. 2846 (1991); see also FOIA Update, Summer 1991, at 1-2.

[56] 761 F. Supp. at 1451.

[57] Id.

[58] Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983); see Holland v. CIA, No. 91-1233, slip op. at 13 (D.D.C. Aug. 31, 1992) (plaintiff failed to overcome "number of hurdles" involved in meeting initial burden of proving official disclosure of information at issue); Public Citizen v. Department of State, 782 F. Supp. 144, 145-46 (D.D.C. 1992) ("[F]act [plaintiff has shown] that some of the information [contained in documents] was revealed does not negate the confidentiality of the documents as they exist."), reconsideration & summary judgment granted, 787 F. Supp. 12 (D.D.C. 1992) (appeal pending); Pfeiffer v. CIA, 721 F. Supp. 337, 342 (D.D.C. 1989) (plaintiff must do more than simply identify "information that happens to find its way into a published account" to meet this burden); cf. Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992) ("[P]arty who asserts . . . material publicly available carries the burden of production on that issue . . . because the task of proving the negative--that the information has not been revealed--might require the government to undertake an exhaustive, potentially limitless search.") (Exemptions 3, 7(C) and 7(D)); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) ("It is far more efficient, and . . . fairer, to place the burden of production on the party who claims that the information is publicly available.") (reverse FOIA suit). But see Washington Post v. DOD, 766 F. Supp. 1, 12-13 (D.D.C. 1991) (agency has ultimate burden of proof when comparing publicly disclosed information with information being withheld, determining whether information is identical and, if not, determining whether release of slightly different information would harm national security).

holding that classified information is not considered to be in the public domain unless it has been the subject of an official disclosure.[59]

In a 1990 decision, the Court of Appeals for the District of Columbia Circuit held that for information to be "officially acknowledged" in the context of Exemption 1, it must: (1) be as "specific" as the information previously released; (2) "match" the information previously disclosed; and (3) have been made public through an "official and documented" disclosure.[60] In applying

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[59] See, e.g., Hoch v. CIA, No. 88-5422, slip op. at 2 (D.C. Cir. July 20, 1990) (Without official confirmation, "clear precedent establishes that courts will not compel [an agency] to disclose information even though it has been the subject of media reports and speculation."); Carney v. CIA, No. 88-602, slip op. at 61-62 (C.D. Cal. Feb. 28, 1991) (magistrate's recommendation) (successful "prior disclosure" argument must be based upon factual allegations that agency "officially previously disclosed documents that are identical in content to documents [it] continues to exempt from disclosure"; newspaper articles and press conferences not considered "official disclosures"), supplemental report & recommendation (C.D. Cal. Apr. 25, 1991), adopted (C.D. Cal. Apr. 26, 1991); see also Simmons v. United States Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (there had been no "widespread dissemination" of information in question); Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985) (even if withheld data was same as estimate in public domain, not same as knowing NRC's official policy as to "proper level of threat a nuclear facility should guard against"); Afshar v. Department of State, 702 F.2d at 1130-31 (foreign government can ignore "[u]nofficial leaks and public surmise . . . but official acknowledgment may force a government to retaliate"); Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 802 (D.D.C. 1992) ("Passage of time, media reports and informed or uninformed speculation based on statements by participants cannot be used . . . to undermine [government's] legitimate interest in protecting international security [information]") (appeal pending); Rush v. Department of State, No. 88-8245, slip op. at 19 (S.D. Fla. Sept. 12, 1990) (magistrate's recommendation) (fact that existence of secret negotiations officially acknowledged does not mean that substance of such talks has been officially disclosed by government), adopted, 748 F. Supp. 1548, 1549, 1555 (S.D. Fla. 1990); Van Atta v. Defense Intelligence Agency, No. 87-1508, slip op. at 5-6 (D.D.C. July 6, 1988) (disclosure of information to foreign government during diplomatic negotiations held not "public disclosure"); cf. Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (fact that some information about subject of request may have been made public by other governmental agencies found not to defeat agency's "Glomar" response in Exemption 3 context); Maxwell v. First Nat'l Bank of Md., 143 F.R.D. 590, 597-98 (D. Md. 1992) (published articles "speculating" on possible relationship between CIA and corporation do not constitute official confirmation of such fact) (state secrets privilege). Contra Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (Exemption 1 protection not available where same documents were disclosed by foreign government or where same information was disclosed to press in "off-the-record exchanges").

[60] Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990); see also Afshar (continued...)

these criteria, the D.C. Circuit reversed the lower court's disclosure order and held that information published in a congressional report did not constitute "official acknowledgment" of the purported location of a CIA station, because the information sought related to an earlier time period than that discussed in the report.[61] In so ruling, it did not address the broader question of whether congressional release of the identical information relating to intelligence sources and methods could ever constitute "official acknowledgment," thus requiring disclosure under the FOIA.[62] However, the D.C. Circuit had previously considered this broader question and had concluded that congressional publications do not constitute "official acknowledgment" for purposes of the FOIA.[63]

In another case, the Court of Appeals for the Second Circuit rejected the argument that a retired admiral's statements constituted an authoritative disclosure by the government.[64] It pointedly stated: "Officials no longer serving with an executive branch department cannot continue to disclose official agency policy, and certainly they cannot establish what is agency policy through speculation, no matter how reasonable it may appear to be."[65] Additionally, the Second Circuit affirmed the decision of the district court in holding that the congressional testimony of high-ranking Navy officials did not constitute official disclosure because it did not concern the specific information being sought.[66]

Indeed, in one case, the court went so far as to hold that 180,000 pages of CIA records pertaining to Guatemala were properly classified despite the fact that the public domain contained significant information and speculation about CIA involvement in the 1954 coup in Guatemala: "CIA clearance of books and

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[60](...continued)
v. Department of State, 702 F.2d at 1130, 1133-34; Public Citizen v. Department of State, 787 F. Supp. 12, 13 (D.D.C. 1992) (applying Fitzgibbon standards) (appeal pending); Public Citizen v. Department of State, 782 F. Supp. at 146 (same). But see Krikorian v. Department of State, 984 F.2d 461, 467-68 (D.C. Cir. 1993) (remanding to district court to determine whether information excised in one document "officially acknowledged" by comparing publicly available record with record withheld; leaving to district court's discretion whether this can be better accomplished by supplemental agency affidavit or by in camera inspection).

[61] 911 F.2d at 765-66.

[62] Id.

[63] See, e.g., Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (information in Senate report "cannot be equated with disclosure by the agency itself"); Military Audit Project v. Casey, 656 F.2d 724, 744 (D.C. Cir. 1981) (Senate report does not constitute official release of information).

[64] See Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989).

[65] Id. at 422.

[66] Id. at 421.

articles, books written by former CIA officials, and general discussions in Congressional publications do not constitute official disclosures."[67] In a subsequent case, one court went even further and held that documents were properly classified even though disclosed "involuntarily as a result of [a] tragic accident such as an aborted rescue mission [in Iran], or used in evidence to prosecute espionage."[68]

A recent district court case involved the question of whether the public congressional testimony of the U.S. Ambassador to Iraq had "waived" the agency's ability to invoke Exemption 1 to withhold related records.[69] In the first of two decisions, the court held, after in camera review, that the public testimony had not "waived" Exemption 1 protection as to five of the seven documents at issue, because the "context" of the information in the documents was sufficiently "different" so as to not "negate" their "confidentiality."[70] It ruled, however, that "waiver" had occurred as to the other two documents, and ordered disclosure of the Ambassador's memorandum relating to the published "transcript" of her last meeting with the Iraqi leader prior to the invasion of Kuwait.[71] Upon reconsideration, the court confessed "clear error" and held that "while certain facts contained in the [two remaining] documents were revealed [in the public testimony], the context in which the information appears is significantly different."[72] Accordingly, in applying the "strict" standard for a finding of "waiver" in Exemption 1 cases, it found that the Ambassador's testimony did not constitute an "official acknowledgment" requiring disclosure under the FOIA.[73] (For a further discussion of this issue, see Discretionary Disclosure and Waiver, below.)

A final, rather obvious point--but still one not accepted by some requesters--is that classified information will not be released under the FOIA even to a

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[67] Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984); accord Pfeiffer v. CIA, 721 F. Supp. at 342; see also Washington Post v. DOD, 766 F. Supp. at 11-12 (no "presumption of reliability" for facts contained in books subject to prepublication review by government agency); cf. McGehee v. Casey, 718 F.2d 1137, 1141 & n.9 (D.C. Cir. 1983) (CIA cannot reasonably bear burden of conducting exhaustive search to prove that particular items of classified information have never been published) (non-FOIA case).

[68] Washington Post Co. v. DOD, No. 84-3400, slip op. at 3 (D.D.C. Sept. 22, 1986).

[69] Public Citizen v. Department of State, 782 F. Supp. at 145.

[70] 782 F. Supp. at 146.

[71] Id. at 146-47.

[72] 787 F. Supp. at 13, 15.

[73] Id. at 15.

requester of "unquestioned loyalty."[74] In a case decided several years ago, a government employee with a current "Top Secret" security clearance was denied access to classified records pertaining to himself because Exemption 1 protects "information from disclosure based on the nature of the material, not on the nature of the individual requester."[75]

Executive Order No. 12,356

Until a new executive order on national security information is issued,[76] the course of future litigation of Exemption 1 withholdings will continue to depend upon precedents established under Executive Order No. 12,356.[77] On August 1, 1982, when Executive Order No. 12,356 replaced Executive Order No. 12,065, many government records had already been reviewed and marked pursuant to the superseded executive order. The appropriate executive order to be applied, with accompanying procedural and substantive standards, depends upon when the responsible agency official took the final classification action on the record in question.[78] In early decisions under Executive Order No.

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[74] Levine v. Department of Justice, No. 83-1685, slip op. at 6 (D.D.C. Mar. 30, 1984) (regardless of requester's loyalty, release of documents to him could "open the door to secondary disclosure to others").

[75] Martens v. United States Dep't of Commerce, No. 88-3334, slip op. at 8 (D.D.C. Aug. 6, 1990) (Privacy Act case); see also Miller v. Casey, 730 F.2d 773, 778 (D.C. Cir. 1984) (agency decision to deny historical research access not reviewable by courts); cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) ("[T]he identity of the requester has no bearing on the merits of his or her FOIA request.") (Exemption 7(C)); FOIA Update, Spring 1989, at 5 (as general rule, all FOIA requesters should be treated alike).

[76] See Presidential Review Directive 29 (Apr. 26, 1993) (establishing interagency task force to draft new executive order on national security information).

[77] 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988).

[78] See Bonner v. United States Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (holding that judicial review of Exemption 1 excisions "properly focuses on the time the determination to withhold is made [by the agency]," and rejecting requester's argument that court should apply procedural and substantive requirements in existence at time of court's de novo review, because "[t]o require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing"); King v. United States Dep't of Justice, 830 F.2d 210, 215-17 (D.C. Cir. 1987); Miller v. United States Dep't of State, 779 F.2d 1378, 1388 (8th Cir. 1985); Lesar v. United States Dep't of Justice, 636 F.2d 472, 480 (D.C. Cir. 1980); Assassination Archives & Research Ctr., Inc. v. CIA, 720 F. Supp. 217, 221-22 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 13, 1990); Hoch v. CIA, 593 F. Supp. 675, 679-80 (D.D.C. 1984), aff'd, 907 F.2d 1227 (D.C. Cir. 1990) (table cite). But see Powell v. United

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12,356, the most controversial aspect of Executive Order No. 12,065--Section 3-303's balancing of the public's interest in disclosure against the government's need for national security secrecy--was found to have been mooted by the issuance of the current executive order, which does not contain a balancing provision.[79]

Executive Order No. 12,356 recognizes both the right of the public to be informed about activities of its government and the need to protect national security information from unauthorized or untimely disclosure. Accordingly, information may not be classified unless "its disclosure reasonably could be expected to cause damage to the national security."[80] Courts grappling with the degree of certainty necessary to demonstrate the contemplated damage under this standard have recognized that an agency's articulation of the threatened harm must always be speculative to some extent and that to require an actual showing of harm would be judicial "over-stepping."[81] In the area of intelligence sources and methods, courts are strongly inclined to accept the agency's position that disclosure of this type of information will cause damage to national security interests because this is "necessarily a region for forecasts in which [the agency's] informed judgment as to potential future harm should be respected."[82]

This standard is elaborated upon in Section 1.3 of the order, which specifies the types of information that may be considered for classification. Executive Order No. 12,356 establishes as bases for classification several widely

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[78](...continued)
States Dep't of Justice, No. C-82-326, slip op. at 3 (N.D. Cal. June 14, 1985) (upon court-ordered re-review of classification, agency "cannot now hide behind the classification system in effect at the time the agency first analyzed the documents").

[79] See Afshar v. Department of State, 702 F.2d 1125, 1137 (D.C. Cir. 1983); Republic of New Afrika v. FBI, 656 F. Supp. 7, 14 (D.D.C. 1985); see also King v. United States Dep't of Justice, 830 F.2d at 216; Keys v. United States Dep't of Justice, No. 85-2588, slip op. at 5 (D.D.C. May 12, 1986) ("The public interest is not [now] a concern to be balanced in applying this exemption."), aff'd, 830 F.2d 337 (D.C. Cir. 1987); cf. Halkin v. Helms, 690 F.2d 977, 994 n.65 (D.C. Cir. 1982) (state secrets privilege case).

[80] Exec. Order No. 12,356, § 1.1(a)(3).

[81] Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980); cf. Snepp v. United States, 444 U.S. 507, 513 n.8 (1980) ("The problem is to ensure, in advance, and by proper [CIA prepublication review] procedures, that information detrimental to the national interest is not published.") (non-FOIA case).

[82] Gardels v. CIA, 689 F.2d 1100, 1106 (D.C. Cir. 1982); see also Washington Post v. DOD, 766 F. Supp. 1, 7 (D.D.C. 1991) (disclosure of working files of failed Iranian hostage rescue attempt containing intelligence planning documents would "serve as a model of 'do's and don't's'" for future counter-terrorist missions "with similar objectives and obstacles").

recognized information categories: foreign government information;[83] vulnerabilities or capabilities of systems, installations, projects or plans relating to national security;[84] intelligence sources or methods;[85] foreign relations or foreign activities;[86] and military plans, weapons, or operations.[87] Executive Or-

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[83] See, e.g., Krikorian v. Department of State, 984 F.2d 461, 465 (D.C. Cir. 1993) (telegram reporting discussion between agency official and high-ranking foreign diplomat regarding terrorism properly withheld as foreign government information; release would "jeopardize 'reciprocal confidentiality'" between governments); Southam News v. INS, 674 F. Supp. 881, 884 (D.D.C. 1987); Shaw v. United States Dep't of State, 559 F. Supp. 1053, 1063 (D.D.C. 1983).

[84] See, e.g., Gottesdiener v. Secret Serv., No. 86-576, slip op. at 5 (D.D.C. Feb. 21, 1989).

[85] See, e.g., Patterson v. FBI, 893 F.2d 595, 597, 601 (3d Cir. 1990) (information pertaining to intelligence sources and methods used by FBI in investigation of student who corresponded with 169 foreign nations), cert. denied, 498 U.S. 812 (1990); Jones v. FBI, No. C77-1001, slip op. at 8 (N.D. Ohio Aug. 12, 1992) ("numerical designators" assigned to national security sources) (appeal pending); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 709-11 (W.D.N.Y. 1991) (intelligence activities or methods, intelligence file numbers and other detailed information which could reveal a source); Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 4-7 (D.D.C. Dec. 19, 1990) (counterterrorism policy paper which could inhibit potential sources from providing intelligence information and limit ability of government to "penetrate" terrorist organizations); Allen v. DOD, 658 F. Supp. 15, 19-21 (D.D.C. 1986) (including deceased, potential and unwitting intelligence sources); cf. Knight v. CIA, 872 F.2d 660, 664 (5th Cir. 1989) (intelligence sources and methods protected under Exemption 3), cert. denied, 494 U.S. 1004 (1990).

[86] See, e.g., United States Comm. for Refugees v. Department of State, No. 91-3303, slip op. at 4-6 (D.D.C. Aug. 30, 1993) (disclosure of withheld information could damage nation's foreign policy by jeopardizing success of negotiations with Haiti on refugee issues "because documents contain frank assessments about the Haitian government"); St. Hilaire v. Department of Justice, No. 91-0078, slip op. at 8 (D.D.C. Mar. 18, 1992) (protecting portions of two cables between Department of State and its embassies because "protecting communications between . . . diplomatic instruments of sovereign states certainly [is an] . . . appropriate reason for classifying documents"); Van Atta v. Defense Intelligence Agency, No. 87-1508, slip op. at 4 (D.D.C. July 6, 1988) (information compiled at request of foreign government for purpose of negotiations); American Jewish Congress v. Department of the Treasury, 549 F. Supp. 1270, 1276-79 (D.D.C. 1982), aff'd, 713 F.2d 864 (D.C. Cir.) (table cite), cert. denied, 464 U.S. 895 (1983).

[87] See, e.g., Taylor v. Department of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (protection of combat-ready troop assessments); Washington Post Co. v. DOD, No. 84-2403, slip op. at 3 (D.D.C. Apr. 15, 1988) (foreign military information); Hudson River Sloop Clearwater, Inc. v. Department of the

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der No. 12,356 also includes as classified any information which concerns cryptology,[88] and scientific, technological, or economic matters relating to national security.[89]

Of the classification categories identified above, it should be noted that Executive Order No. 12,356 establishes a presumption that the unauthorized disclosure of certain categories of information--foreign government information, the identity of a confidential foreign source and intelligence sources and methods--will cause damage to the national security.[90] This presumption has been recognized and applied in FOIA cases involving Exemption 1.[91]

In addition, Executive Order No. 12,356 permits the classification of other categories of information that are related to the national security and

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[87](...continued)
Navy, 659 F. Supp. 674, 679 (E.D.N.Y. 1987) (NEPA/FOIA case), aff'd, 891 F.2d 414, 417 (2d Cir. 1989); Washington Post Co. v. DOD, No. 84-2402, slip op. at 16 (D.D.C. Apr. 11, 1988).

[88] See McDonnell v. United States, No. 91-5916, slip op. at 25 (3d Cir. Sept. 21, 1993) (upholding classification of cryptographic information dating back to 1934 where release "could enable hostile entities to interpret other, more sensitive documents similarly encoded") (to be published); Gilmore v. NSA, No. C92-3646, slip op. at 14, 17-18 (N.D. Cal. Apr. 30, 1993) (mathematical principles and techniques in agency treatise protectible under this category of executive order).

[89] Exec. Order No. 12,356, § 1.3; cf. U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 9 (D.D.C. Mar. 26, 1986) (protection of information regarding armoring of President's limousines).

[90] Exec. Order No. 12,356, § 1.3(c).

[91] See, e.g., Maynard v. CIA, 986 F.2d 547, 555 (1st Cir. 1993) (application of presumption in case involving intelligence sources and methods); Krikorian v. Department of State, 984 F.2d at 465 n.4 (noting presumed damage in connection with unauthorized disclosure of foreign government information); Holland v. CIA, No. 91-1233, slip op. at 12, 22 (D.D.C. Aug. 31, 1992) (court will not "second guess" propriety of classification, especially due to fact that identity of intelligence sources and methods and foreign government information is "presumed" to cause damage to national security); Green v. United States Dep't of State, No. 85-504, slip op. at 13 n.31 (D.D.C. Apr. 17, 1990) ("In examining the plausibility of defendant's explanation as to how disclosure of the information . . . could reasonably be expected to pose a danger to the national security, the [c]ourt must take into account that [disclosure of much of the information in question] is presumed to cause damage to the national security."); Siminoski v. FBI, No. 83-6499, slip op. at 15, 17 (C.D. Cal. Jan. 16, 1990) (disclosure of redactions relating to identity of foreign liaisons and intelligence sources presumed to result in damage to national security; no agency bad faith shown to "upset that presumption").

which require protection against unauthorized disclosure.[92] Moreover, in those instances in which there is "reasonable doubt" about the need to classify information, or to classify information at a higher level, the order permits classification pending a final determination within 30 days.[93]

It should be noted that Executive Order No. 12,356 also contains a number of limitations on classification.[94] For example, information may not be classified to conceal violations of law,[95] to prevent embarrassment to a person or an agency,[96] or to restrain competition.[97]

Agencies with questions about the proper implementation of the substantive or procedural requirements of Executive Order No. 12,356 may consult with the Information Security Oversight Office (ISOO) within the General Services Administration, which holds governmentwide oversight responsibility for classification matters under the executive order ((202) 634-6150).[98] The Director of ISOO has been named by the President to chair the interagency task force established to draft a replacement executive order.[99]

Duration of Classification

Another important provision of Executive Order No. 12,356 is that "in-

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[92] Exec. Order No. 12,356, § 1.3(a)(10); see, e.g., Gottesdiener v. Secret Serv., slip op. at 5 (records concerning United States' "emergency preparedness programs").

[93] Exec. Order No. 12,356, § 1.1(c).

[94] Id. § 1.6.

[95] Id. § 1.6(a); see also Navasky v. CIA, 499 F. Supp. 269, 275-76 (S.D.N.Y. 1980) (rejecting as irrelevant requester's claim of illegality under similar provision in prior executive order so long as information properly classified pursuant to order's substantive requirements; likewise rejecting defendant's claim of national security harm based upon possible loss of employment or damage to reputation for those persons cooperating with CIA's clandestine book-publishing activities), aff'd, 679 F.2d 873 (2d Cir. 1981) (table cite), cert. denied, 459 U.S. 822 (1982).

[96] Exec. Order No. 12,356, § 1.6(a); see also Wilson v. Department of Justice, No. 87-2415, slip op. at 3-4 (D.D.C. June 13, 1991) (rejecting requester's claim that information was classified to prevent embarrassment to foreign government official and holding that "even if some . . . information . . . were embarrassing to Egyptian officials, it would nonetheless be covered by Exemption 1 if, independent of any desire to avoid embarrassment, the information withheld [was] properly classified").

[97] Exec. Order No. 12,356, § 1.6(a).

[98] See id. § 5.2; see also FOIA Update, Winter 1985, at 1-2.

[99] See Presidential Review Directive 29 at 2.

formation shall be classified as long as required by national security considerations" and time frames no longer trigger automatic declassification.[100] To be sure, the passage of time from the origination of the information to the classification review might cause a court to question the national security damage that could result from disclosure.[101] Accordingly, while the age of records has some bearing on whether they warrant continued protection under Exemption 1, numerous precedents stand firmly for the proposition that the passage of time does not, by itself, require that national security information be declassified automatically and disclosed.[102]

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[100] Exec. Order No. 12,356, § 1.4(a), 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988); see Branch v. FBI, 700 F. Supp. 47, 48 (D.D.C. 1988) ("Executive Order No. 12,356 does not create a presumption favoring disclosure of documents once they reach a certain age.").

[101] See King v. United States Dep't of Justice, 830 F.2d 210, 226 (D.C. Cir. 1987) (documents more than 35 years old); see also Silets v. FBI, 591 F. Supp. 490, 496 (N.D. Ill. 1984) (documents over 20 years old regarding Jimmy Hoffa); Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1517 (N.D. Cal. 1984) (fact that information is 22 to 35 years old and concerns "highly publicized treason and sedition case which has been closed for over twenty years" requires government to "address the significance of the age of the information"); cf. CIA v. Sims, 471 U.S. 159, 177 (1985) (Exemption 3 case upholding protection for documents over 20 years old the disclosure of which would reveal the identities of intelligence sources, including deceased, potential and unwitting sources); Fitzgibbon v. CIA, 911 F.2d 755, 764 (D.C. Cir. 1990) (holding that, in contrast to traditional Exemption 1 analysis, passage of time has no impact on releasability of information in Exemption 3 context involving intelligence sources and methods).

[102] See, e.g., McDonnell v. United States, No. 91-5916, slip op. at 25-26 (3d Cir. Sept. 21, 1993) (rejecting plaintiff's argument that cryptographic information classified as exempt in 1934 is no longer entitled to protection because of passage of time) (to be published); Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) ("[P]assage of some thirty years does not, by itself, invalidate [agency's] showing under Exemption 1."); Afshar v. Department of State, 702 F.2d 1125, 1138 n.18 (D.C. Cir. 1983) (change in circumstances does not require review of original classification); Holland v. CIA, No. 91-1233, slip op. at 12 (D.D.C. Aug. 31, 1992) (fact that intelligence estimate is 25 years old held "of no consequence [where] plaintiff's speculation that . . . passage of time diminishes need for its secrecy . . . a 'mere hypothetical,' and because Executive Order 12356 establishes no presumption in favor of disclosure of [classified information] after a period of time"); Varelli v. FBI, No. 88-1865, slip op. at 9 (D.D.C. Oct. 4, 1991) (upholding application of Exemption 1 because "passage of time . . . does not dissipate . . . possibility of retribution being visited upon . . . intelligence sources and their families"); Siminoski v. FBI, No. 83-6499, slip op. at 17-18 (C.D. Cal. Jan. 16, 1990) (upholding classification of documents more than 40 years old because "age alone does not mandate release of otherwise sensitive documents"); Assassination Archives & Research Ctr., Inc. v. CIA, 720 F. Supp. 217, 222 (D.D.C. 1989) (permitting

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In addition, the order prohibits any automatic declassification because of "unofficial publication or inadvertent or unauthorized disclosure" of classified information.[103] In fact, declassified and disclosed information may be reclassified if the information is classified and "may reasonably be recovered."[104] Moreover, it is well settled that information may be "classified or reclassified" after it has been requested under the FOIA.[105]

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[102](...continued)
withholding of "old" information and distinguishing King v. United States Dep't of Justice on basis of involvement of intelligence agency and applicability of more "protective" executive order), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 13, 1990); Oglesby v. United States Dep't of the Army, No. 87-3349, slip op. at 5 (D.D.C. May 23, 1989) (Exemption 1 properly applied to documents over 30 years old), aff'd on other grounds, 920 F.2d 57 (D.C. Cir. 1990); Southam News v. INS, No. 85-2721, slip op. at 10-11 (D.D.C. May 18, 1989) ("If the United States were to proceed unilaterally to declassify documents provided by Canada as secret merely because twenty years has passed, the value of a promise of confidentiality by the United States would be greatly diminished.").

[103] Exec. Order No. 12,356, § 1.3(d); see, e.g., Simmons v. United States Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (possible disclosure of classified documents by FBI agent was not in official capacity, hence did not require automatic declassification).

[104] Exec. Order No. 12,356, § 1.6(c).

[105] Id. § 1.6(d); see also Goldberg v. United States Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987) (fact that many cables sought under FOIA initially marked unclassified by ambassadors held "immaterial," as pertinent executive order allows agencies to reclassify records in response to FOIA requests), cert. denied, 485 U.S. 904 (1988); Miller v. United States Dep't of State, 779 F.2d 1378, 1388 (8th Cir. 1985) (16-year delay between origination and classification of documents held "insufficient to justify disclosure"); Lesar v. United States Dep't of Justice, 636 F.2d 472, 484-85 (D.C. Cir. 1980) (belated classification appropriate); National Sec. Archive v. FBI, No. 88-1507, slip op. at 3 n.2 (D.D.C. Apr. 14, 1993) (reclassification of portions of briefing book held proper) (appeal pending); Green v. United States Dep't of State, No. 85-504, slip op. at 4-5 (D.D.C. Apr. 17, 1990) (agency may reclassify documents "pursuant to executive orders issued subsequent to its initial classification decision"); cf. Nation Co. v. Archivist of the United States, No. 88-1939, slip op. at 8 (D.D.C. July 24, 1990) (reclassification after initiation of litigation not "fatal" unless "used to cover up embarrassing information") (FACA case); American Library Ass'n v. NSA, 631 F. Supp. 416, 422 (D.D.C. 1986) (no First Amendment right to access to documents classified subsequent to their inadvertent public disclosure), aff'd on other grounds, 818 F.2d 81 (D.C. Cir. 1987). But see Shanmugadhasan v. United States Dep't of the Navy, No. 84-6474, slip op. at 1 (9th Cir. Dec. 17, 1985) (remanding for in camera inspection due to belated classification and generalized affidavit).

Additional Considerations

Two additional considerations addressed by Executive Order No. 12,356 have already been recognized by the courts. First, the "Glomar" denial, discussed above, is incorporated into the order: "[A]n agency shall refuse to confirm or deny the existence or nonexistence of requested information whenever . . . its existence or nonexistence is itself classifiable under this Order."[106]

Second, the "mosaic" approach--the concept that apparently harmless pieces of information, when assembled together, could reveal a damaging picture--is recognized in the very definition of classified information: "Information . . . shall be classified when . . . its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security."[107] This approach was presaged by a decision of the Court of Appeals for the District of Columbia Circuit in 1980[108] and, after the issuance of the executive order, subsequently endorsed by the same court.[109] The D.C. Circuit has also reaffirmed that even if there

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[106] Exec. Order No. 12,356, § 3.4(f)(1), 3 C.F.R. 166 (1983), reprinted in 50 U.S.C. § 401 note (1988); see, e.g., Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 417 (2d Cir. 1989) (fact of presence of nuclear weapons aboard particular naval ships is classified in itself); Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984) (whether CIA conducted covert activities in Albania following World War II is classified in itself); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) (fact that, even under prior Executive order, "existence or non-existence" of intercept by NSA of cable purportedly sent by Jack Ruby's brother to Cuba prior to Kennedy assassination classified); D'Aleo v. Department of the Navy, No. 89-2347, slip op. at 4 (D.D.C. Mar. 27, 1991) (any confirmation or denial of existence of nondisclosure agreement allegedly signed by plaintiff would cause serious damage to national security); Nelson v. United States Dep't of Justice, No. 1:90-1119, slip op. at 1-3 (N.D. Ga. Sept. 12, 1990) (fact of existence of records agency might possess under Foreign Intelligence Surveillance Act itself classified), aff'd, 953 F.2d 650 (11th Cir.) (table cite), cert. denied, 112 S. Ct. 1955 (1992); Marrera v. United States Dep't of Justice, 622 F. Supp. 51, 53 (D.D.C. 1985) (same); see also Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982) (Exemptions 1 and 3); cf. Hunt v. CIA, 981 F.2d 1116, 1118-20 (9th Cir. 1992) (agency's refusal to confirm or deny existence of records pertaining to Iranian national requested by person on trial for murder of that Iranian held proper pursuant to Exemption 3).

[107] Exec. Order No. 12,356, § 1.3(b).

[108] Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) ("Each individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.").

[109] See Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (explicitly acknowledging "mosaic-like nature of intelligence gathering"); ac-

(continued...)

is other information that if released "would pose a greater threat to the national security," Exemption 1 "'bars the government from prying loose even the smallest bit of information that is properly classified.'"[110]

Another point to remember under Exemption 1 is the requirement that agencies segregate and release nonexempt information, unless the segregated information would have no meaning.[111] The duty to release information that is "reasonably segregable"[112] applies in cases involving classified information as well as cases involving nonclassified information.[113] During the past two

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[109](...continued)
cord CIA v. Sims, 471 U.S. 159, 178 (1985) (Exemption 3); American Friends Serv. Comm. v. DOD, 831 F.2d 441, 444-45 (3d Cir. 1987) (recognizing "compilation" theory); Taylor v. Department of the Army, 684 F.2d 99, 105 (D.C. Cir. 1982) (upholding classification of compilation of information on army combat units); see also Varelli v. FBI, No. 88-1865, slip op. at 8 (D.D.C. Oct. 4, 1991) (upholding agency's determination that release of "such mundane information . . . as file numbers, code names and symbol source identifiers" would enable "hostile analyst to piece together information, which could, in aggregate with other information, lead to disclosure" of intelligence sources and activities); National Sec. Archive v. FBI, 759 F. Supp. 872, 877 (D.D.C. 1991) (disclosure of code names and designator phrases could provide hostile intelligence analyst with "common denominator" permitting analyst to piece together seemingly unrelated data into snapshot of specific FBI counterintelligence activity); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 709-10 (W.D.N.Y. 1991) (upholding classification of any source-identifying word or phrase, which could by itself or in aggregate lead to disclosure of intelligence source).

[110] Abbotts v. NRC, 766 F.2d 604, 608 (D.C. Cir. 1985) (quoting Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)).

[111] See, e.g., Doherty v. United States Dep't of Justice, 775 F.2d 49, 53 (2d Cir. 1985); Paisley v. CIA, 712 F.2d 686, 700 (D.C. Cir. 1983); Bevis v. Department of the Army, No. 87-1893, slip op. at 2 (D.D.C. Sept. 16, 1988) (redaction not required when it would reduce balance of text to "unintelligible gibberish"); American Friends Serv. Comm. v. DOD, No. 83-4916, slip op. at 11-12 (E.D. Pa. Aug. 4, 1988) (very fact that records sought would have to be extensively "reformulated, re-worked and shuffled" prior to any disclosure established that nonexempt material was "inextricably intertwined" with exempt material), aff'd, 869 F.2d 587 (3d Cir. 1989) (table cite).

[112] 5 U.S.C. § 552(b) (final sentence) (1988).

[113] See, e.g., Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 n.12 (D.C. Cir. 1990) (dictum) (noting failure of Army affidavit to specify whether any reasonably segregable portions of 483-page document were withheld pursuant to Exemption 1); Ray v. Turner, 587 F.2d 1187, 1197 (D.C. Cir. 1978) (remanding for greater specificity in affidavit because agency may not rely on "exemption by document" approach even in Exemption 1 context); Branch v. FBI, 658 F. Supp. 204, 210 (D.D.C. 1987) (criticizing language in (continued...)

years, the D.C. Circuit has reemphasized the FOIA's segregation requirement in a series of decisions,[114] one of which involved records withheld pursuant to Exemption 1.[115] In that Exemption 1 decision, the D.C. Circuit--although upholding the district court's substantive determination that the records contained information qualifying for Exemption 1 protection--nonetheless remanded the case to the district court because it had failed to "make specific findings of segregability for each of the withheld documents."[116]

As a final matter, agencies should be aware of the FOIA's "(c)(3) exclusion."[117] This special record exclusion applies to certain especially sensitive records maintained by the Federal Bureau of Investigation which pertain to foreign intelligence, counterintelligence or international terrorism matters. Where the existence of such records is itself a classified fact, the FBI may, so long as the existence of the records remains classified, treat the records as not subject to the requirements of the FOIA. (See discussion under Exclusions, below.)

EXEMPTION 2

Exemption 2 of the FOIA exempts from mandatory disclosure records "related solely to the internal personnel rules and practices of an agency."[1] The courts have interpreted the exemption to encompass two distinct categories of information:

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[113](...continued)
FBI affidavit regarding segregation); see also Holland v. CIA, No. 91-1233, slip op. at 22 (D.D.C. Aug. 31, 1992) (finding "sufficient showing of good faith" by agency in segregating exempt from nonexempt information, based on review of declarations, together with examination of redacted documents and fact that subsequent releases were made during litigation).

[114] See Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067, 1068, 1071-72 (D.C. Cir. 1993); Krikorian v. Department of State, 984 F.2d 461, 466-67 (D.C. Cir. 1993); PHE, Inc. v. Department of Justice, 983 F.2d 248, 252-53 (D.C. Cir. 1993); Schiller v. NLRB, 965 F.2d 1205, 1210 (D.C. Cir. 1992).

[115] Krikorian v. Department of State, 984 F.2d at 466-67; see also Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, No. C89-1843, slip op. at 7-8, 11-12 (N.D. Cal. June 4, 1993) (applying Schiller standard in Exemption 1 case).

[116] Krikorian v. Department of State, 984 F.2d at 467.

[117] 5 U.S.C. § 552(c)(3) (1988); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 24-25 (Dec. 1987).

[1] 5 U.S.C. § 552(b)(2) (1988).

(a) internal matters of a relatively trivial nature--sometimes referred to as "low 2" information; and

(b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement--sometimes referred to as "high 2" information.[2]

There has long existed some confusion concerning the intended coverage of both aspects of Exemption 2. The case law interpreting the exemption has been divided, reflecting the differing ways in which Exemption 2 was addressed in the Senate and House Reports when the FOIA was enacted. The Senate Report stated:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.[3]

The House Report provided a more expansive interpretation of Exemption 2's coverage, stating that it was intended to include:

> [o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners . . . but [that] this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under present law.[4]

These two statements contain an evident conflict in their treatment of the first category of information encompassed by this exemption--routine internal matters. The Supreme Court confronted this conflict in a case in which a requester sought to obtain case summaries of Air Force Academy ethics hearings, and it found the Senate Report to be more authoritative, at least with regard to the coverage intended for routine internal matters.[5] In Department of the Air Force v. Rose, the Supreme Court construed Exemption 2's somewhat ambiguous language as protecting internal agency matters so routine or trivial that they could *not* be "subject to . . . a genuine and significant public interest."[6] The Supreme Court also declared that Exemption 2 was intended to relieve agencies of the burden of assembling and providing access to any "matter in which the public could not reasonably be expected to have an interest."[7] At the same time, the Court also suggested in Rose that the policy enunciated by the House

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[2] See FOIA Update, Summer 1989, at 3.

[3] S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

[4] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

[5] Department of the Air Force v. Rose, 425 U.S. 352, 366-67 (1976).

[6] Id. at 369.

[7] Id. at 369-70.

Report might permit an agency to withhold matters of some public interest "where disclosure may risk circumvention of agency regulation."[8]

"Low 2": Trivial Matters

It is quite evident from its legislative history and the Supreme Court's decision in Department of the Air Force v. Rose that, with respect to its "low 2" aspect, Exemption 2 is the only exemption in the FOIA having a conceptual underpinning totally unrelated to any harm caused by disclosure per se.[9] Rather, this application of the exemption is based upon the unique rationale that the very task of processing and releasing some requested records would place a harmful administrative burden on the agency that would not be justified by any genuine public benefit.[10]

Although cases decided immediately subsequent to Rose demonstrated that a great deal of uncertainty existed as to the extent of coverage provided by this first aspect of Exemption 2, it now seems to be well established that routine internal personnel matters are properly included within its scope.[11] However, personnel matters of greater general public interest are not so protected.[12]

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[8] Id. at 369.

[9] See Department of the Air Force v. Rose, 425 U.S. 352, 369-70 (1976).

[10] See FOIA Update, Winter 1984, at 10-11 ("FOIA Counselor: The Unique Protection of Exemption 2"); see, e.g., Martin v. Lauer, 686 F.2d 24, 34 (D.C. Cir. 1982) (Exemption 2 "serves to relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest."); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 10 n.8 (D.D.C. 1991) (citing Martin), aff'd, 968 F.2d 92 (D.C. Cir. 1992) (table cite).

[11] See, e.g., Small v. IRS, 820 F. Supp. 163, 168 (D.N.J. 1992) (employee service identification numbers); Pruner v. Department of the Army, 755 F. Supp. 362, 365 (D. Kan. 1991) (Army regulation concerning discharge of conscientious objectors); FBI Agents Ass'n v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,058, at 83,566-67 (D.D.C. Jan. 13, 1983) (information relating to performance ratings, recognition and awards, leave practices, transfers, travel expenses and allowances); National Treasury Employees Union v. United States Dep't of the Treasury, 487 F. Supp. 1321, 1324 (D.D.C. 1980) (bargaining history and IRS interpretation of labor contract provisions); Frank v. United States Dep't of Justice, 480 F. Supp. 596, 597-98 (D.D.C. 1979) (FBI special agents' complaints of mismanagement about personnel matters such as leave, work assignments and overtime, as well as information about ensuing investigation).

[12] See, e.g., Department of the Air Force v. Rose, 425 U.S. at 365-70 (Air Force Academy cadet honor code proceedings); Vaughn v. Rosen, 523 F.2d 1136, 1140-43 (D.C. Cir. 1975) (evaluations of how effectively agency policies were being implemented); Globe Newspaper Co. v. FBI, No. 91-13257, slip op. at 6-8 (D. Mass. Dec. 29, 1992) (amount paid to FBI informant found to be

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Particularly significant to the coverage of "low 2" is its unique application to far more mundane, yet pervasive, administrative records. In a case whose Exemption 2 holding now appears completely undermined, the full Court of Appeals for the District of Columbia Circuit in Jordan v. United States Department of Justice ordered the local U.S. Attorney's Office's prosecutorial guidelines released on the ground that the documents did not fit the narrowly read exemption for "personnel" rules.[13] Subsequently, in Allen v. CIA, the D.C. Circuit ordered the release of such trivial internal information as filing and routing instructions, based upon the conclusion that Congress intended Exemption 2 protection for agency personnel records only, not for "trivial matters unrelated to personnel."[14] The court of appeals panel deciding Allen chose to perceive no conflict with several of the D.C. Circuit's own post-Jordan opinions which had upheld the withholding of items of information pursuant to Exemption 2 that clearly were not related to personnel matters.[15]

One year after Allen, though, the full D.C. Circuit, in Crooker v. Bureau of Alcohol, Tobacco & Firearms, revisited the issue involved in Jordan and adopted a distinctly broader view of Exemption 2, specifically with regard to its law enforcement aspect.[16] Then, in its decision in Founding Church of Scientology v. Smith,[17] the D.C. Circuit finally made it clear that Exemption 2 allows the withholding of a great variety of internal rules, procedures and guidelines, effectively overruling Allen. In Founding Church, the Department of Justice pointedly admitted that it had withheld routine administrative notations "indistinguishable from the filing and routing instructions that were held un-

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[12](...continued)
personally involved in "ongoing criminal activities"); News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. 1264, 1266-68 (D. Mass. 1992) (disciplinary actions taken against Amtrak employees), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992); North v. Walsh, No. 87-2700, slip op. at 3 (D.D.C. June 25, 1991) (travel vouchers of senior officials of Office of Independent Counsel); Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 16, 18 (D. Ariz. July 9, 1987) (agency response to MSPB appeal and administrative inquiry memorandum concerning death of FBI agent), motion to vacate denied (D. Ariz. Dec. 22, 1987); FBI Agents Ass'n v. FBI, 3 Gov't Disclosure Serv. at 83,566-67 (standards of conduct, grievance procedures, EEO procedures); Ferris v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,084, at 82,363 (D.D.C. Dec. 23, 1981) (SES performance objectives).

[13] 591 F.2d 753, 767 (D.C. Cir. 1978) (en banc).

[14] 636 F.2d 1287, 1290 n.21 (D.C. Cir. 1980).

[15] See, e.g., Lesar v. United States Dep't of Justice, 636 F.2d 472, 485 (D.C. Cir. 1980) (informant symbol numbers held protectible under Exemption 2); Cox v. United States Dep't of Justice, 601 F.2d 1, 4 (D.C. Cir. 1979) (per curiam) (sensitive portions of Marshals Service manual held protectible under Exemption 2).

[16] 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (en banc).

[17] 721 F.2d 828 (D.C. Cir. 1983).

protected under FOIA Exemption 2 in Allen," but it urged that Allen be abandoned in light of its discerned conflict with Crooker and Lesar v. United States Department of Justice.[18] Recognizing this conflict, and concluding that Crooker in fact "repudiated the narrow construction of exemption 2 that [had been] adopted in Jordan," the D.C. Circuit in Founding Church did exactly what was urged, expressly holding that Allen "no longer represents the law of this circuit."[19] Instead, it articulated an expanded test to include such routine material:

> First, the material withheld should fall within the terms of the statutory language as a personnel rule or internal practice of the agency. Then, if the material relates to trivial administrative matters of no genuine public interest, exemption would be automatic under the statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.[20]

Consequently, agencies may consider a wide range of administrative information for possible withholding under Exemption 2, regardless of whether it is personnel-related, based upon the unique rationale that the very process of releasing such information would be an unwarranted administrative burden.[21] Trivial administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings may properly be withheld under "low 2."[22]

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[18] Id. at 829.

[19] Id. at 830.

[20] Id. at 830-31 n.4.

[21] See FOIA Update, Winter 1984, at 10-11.

[22] See, e.g., Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) ("administrative markings and notations on documents; room numbers, telephone numbers, and FBI employees' identification numbers; a checklist form used to assist special agents in consensual monitoring; personnel directories containing the names and addresses of FBI employees; and the dissemination page of Hale's 'rap sheet'"), cert. granted, vacated & remanded on other grounds, 113 S. Ct. 3029 (1993); Lesar v. United States Dep't of Justice, 636 F.2d at 485-86 (informant codes held "a matter of internal significance in which the public has no substantial interest [and which] bear no relation to the substantive contents of the records released"); Scherer v. Kelley, 584 F.2d 170, 175-76 (7th Cir. 1978) ("file numbers, initials, signature and mail routing stamps, references to interagency transfers, and data processing references"), cert. denied, 440 U.S. 964 (1979); Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978) ("file numbers, routing stamps, cover letters and secretary initials"); Maroscia v. Levi, 569 F.2d 1000, 1001-02 (7th Cir. 1977) (markings used to maintain control of investigation); Engelking v. DEA, No. 91-165, slip op. at 5 (D.D.C. Nov. 30, 1992) ("The means by which DEA refers to its files (continued...)

In many instances, however, it can be less burdensome for an agency simply to release such information--and agencies should do so.[23]

Most significantly, Exemption 2 has been held to justify the withholding of more extensive and substantive portions of administrative records, even

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[22](...continued)
(violator identifier and informant identifier codes) is a matter of internal significance in which the public has no substantial interest."); Allen v. Bureau of Alcohol, Tobacco & Firearms, No. 91-2640, slip. op at 1-2 (D.D.C. June 30, 1992) (computer codes, symbols and Treasury Enforcement Communication System numbers are "clearly matters" of internal significance), summary affirmance granted, No. 92-5312 (D.C. Cir. May 25, 1993); Doe v. United States Dep't of Justice, 790 F. Supp. 17, 22 (D.D.C. 1992) (internal administrative codes and procedures); Gale v. FBI, 141 F.R.D. 94, 97 (N.D. Ill. 1992) (source symbol numbers relating only to internal procedures of the FBI); Sanders v. United States Dep't of Justice, No. 91-2263, slip op. at 5 (D. Kan. Apr. 21, 1992) (FBI computer codes used to access National Crime Information Center); Soto v. DEA, No. 90-1816, slip op. at 4 (D.D.C. Apr. 4, 1992) (informant identifier codes, G-DEP codes, NADDIS numbers, special agent group assignments and internal criminal case file numbers); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 10 (D.D.C. 1991) (internal symbols and markings); Rodrequez v. United States Postal Serv., No. 90-1886, slip op. at 7 (D.D.C. Oct. 2, 1991) (DEA informant and violator codes, computer codes, telephone numbers and other communications information); Spirovski v. DEA, No. 90-1633, slip op. at 9 (D.D.C. July 24, 1991) (Treasury Department computer database case and file numbers and other administrative markings); Beck v. United States Dep't of the Treasury, No. 88-493, slip op. at 19-20 (D.D.C. Nov. 8, 1989) (computer access codes, system identification numbers, and case and file numbers pertaining to maintenance and security of computer-based telecommunications system), aff'd, 946 F.2d 1563 (D.C. Cir. 1992) (table cite); Southam News v. INS, No. 85-2721, slip op. at 14 (D.D.C. May 18, 1989) (agency control numbers and cover sheet for classified material); Simpson v. United States Dep't of Justice, No. 87-2832, slip op. at 3-4 (D.D.C. Sept. 30, 1988) (routing markings to facilitate communication between DEA headquarters and field offices and other law enforcement agencies "clearly fall within the ambit of administrative trivia"); Branch v. FBI, 658 F. Supp. 204, 208 (D.D.C. 1987) ("There is no question that [source symbol and file numbers are] trivial and may be withheld as a matter of law under Exemption 2."). But see Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 57 (D.D.C. 1990) (applying Schwaner to hold that administrative markings do not "relate to" an agency rule or practice).

[23] See, e.g., Fonda v. CIA, 434 F. Supp. 498, 503 (D.D.C. 1977) (where administrative burden is minimal and it would be easier to release material, policy underlying Exemption 2 does not permit withholding); see also FOIA Update, Winter 1984, at 11 (advising agencies to invoke exemption only where doing so truly avoids burden).

entire documents.[24] As a matter of sound policy and administrative discretion, agencies should concentrate their attention on Exemption 2 withholdings of this latter variety.[25] (See Discretionary Disclosure and Waiver, below.)

One type of administrative record--federal personnel lists--has caused the

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[24] See, e.g., Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (internal time deadlines and procedures, recordkeeping directions, instructions on contacting agency officials for assistance and guidelines on agency decision-making); Nix v. United States, 572 F.2d at 1005 (cover letters protected as matters of merely internal significance); Starkey v. IRS, No. C91-20040, slip op. at 10 (N.D. Cal. Dec. 6, 1991) (facsimile cover sheets, transcript, and employee travel information); Wilson v. Department of Justice, No. 87-2415, slip op. at 5-6 (D.D.C. June 13, 1991) (State Department transmittal slips from low-level officials); Barrett v. OSHA, No. C2-90-147, slip op. at 3-4 (S.D. Ohio Oct. 18, 1990) (administrative steps followed by OSHA prior to issuance of citation are internal); Benavides v. DEA, No. 88-427, slip op. at 4-5 (D.D.C. Feb. 9, 1989) (letters describing administrative procedures properly withheld as purely internal and of no public interest), summary affirmance granted in part sub nom. Benavides v. United States Marshals Serv., No. 89-5060 (D.C. Cir. Sept. 21, 1989); KTVY-TV v. United States Postal Serv., No. 87-1432, slip op. at 15 (W.D. Okla. May 4, 1989) (computerized list of evidence gathered during investigation of shooting incident), aff'd on other grounds, 919 F.2d 1465 (10th Cir. 1990); Destileria Serralles, Inc. v. Department of the Treasury, No. 85-837, slip op. at 6-7 (D.P.R. Sept. 22, 1988) (transmittal correspondence, materials outlining work assignments and time spent by ATF inspectors on assignments, documents reflecting evaluation of evidence compiled during inspection and recommending agency action, and materials describing procedures to be followed in conducting inspections properly withheld as "no more than internal and merely procedural determinations about whether and how to proceed with an investigation"); Cox v. United States Dep't of Justice, No. 87-158, slip op. at 3 (D.D.C. Nov. 17, 1987) (investigation code name, supervising unit, details of property and funding); Dickie v. Department of the Treasury, No. 86-649, slip op. at 3 (D.D.C. Mar. 31, 1987) (case-reporting procedures); Heller v. Marshals Serv., 655 F. Supp. 1088, 1092 (D.D.C. 1987) (brief and personal intra-agency memorandum); Martinez v. FBI, No. 82-1547, slip op. at 10-11 (D.D.C. Dec. 19, 1985) (43 pages of postal inspector caseload management and timekeeping records); Berkosky v. Department of Labor, No. 82-6464, slip op. at 2 (C.D. Cal. May 2, 1984) (routing slip and complaint time log); Ferri v. United States Dep't of Justice, 573 F. Supp. 852, 862 (W.D. Pa. 1983) (two entire documents dealing with an internal administrative matter); Associated Press v. Department of Justice, No. 82-803, slip op. at 44 (D.N.J. Dec. 6, 1982) (entire "closing form"); National Treasury Employees Union v. United States Dep't of the Treasury, 487 F. Supp. at 1324 (internal discussion of collective bargaining matters); Stassi v. Department of the Treasury, No. 78-533, slip op. at 11 (D.D.C. Mar. 30, 1979) (records concerning manhours and dollars spent on investigation).

[25] See FOIA Update, Winter 1984, at 11 (advising this approach given exemption's underlying rationale of avoiding administrative burden involved in processing such records).

courts to struggle with the problem of determining when the threshold Exemption 2 requirement of being "related to" internal agency rules and practices is satisfied. The personal privacy protection of Exemption 6--successfully invoked to protect the names and home addresses of federal employees--is generally unavailable to protect the names and duty addresses of federal employees inasmuch as there ordinarily is no privacy interest in such information.[26]

In 1990, the D.C. Circuit dispositively addressed the possible protection of federal personnel lists under Exemption 2 in Schwaner v. Department of the Air Force.[27] In a two-to-one decision, it held that a list of the names and duty addresses of military personnel stationed at Bolling Air Force Base does not meet the threshold requirement of being "related solely to the internal rules and practices of an agency."[28] The panel majority ruled that "the list does not bear an adequate relation to any rule or practice of the Air Force as those terms are used in exemption 2."[29] In so doing, it gave a new, stricter interpretation to the term "related to" under Exemption 2--holding that if the information in question is not itself actually a "rule or practice," then it must "shed significant light" on a "rule or practice" in order to qualify.[30] The D.C. Circuit concluded that "lists do not necessarily (or perhaps even normally) shed significant light on a rule or practice; insignificant light is not enough."[31] Thus, under Schwaner, Exemption 2 is no longer available at the administrative level to protect agencies from the burdens of processing requests for federal personnel lists.[32]

The second part of the "low 2" analysis concerns whether there "is a genuine and significant public interest" in disclosure of the records requested.[33] A useful illustration of how this "public interest" delineation has been drawn in the past can be found in a decision in which large portions of an FBI administrative manual were ruled properly withholdable on a "burden" theory under Exemption 2, but other portions (because of a discerned "public interest"

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[26] See, e.g., FLRA v. United States Dep't of the Treasury, 884 F.2d 1446, 1452-53 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990); see also FOIA Update, Sept. 1982, at 3; FOIA Update, Summer 1986, at 3-4 (recognizing exceptions for law enforcement and certain military personnel).

[27] 898 F.2d 793 (D.C. Cir. 1990).

[28] Id. at 794.

[29] Id.

[30] Id. at 797.

[31] Id.

[32] See FOIA Update, Spring/Summer 1990, at 2 (modifying prior guidance in light of controlling nature of D.C. Circuit ruling, as circuit of "universal venue" under FOIA).

[33] See Department of the Air Force v. Rose, 425 U.S. at 369.

in them) were not.[34] In making such delineations for administrative records in the wake of Founding Church, agencies must always bear in mind the D.C. Circuit's admonition in that case that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interests."[35]

The nature of this "public interest" in "low 2" cases may be affected by the Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press.[36] In Reporters Committee, the Supreme Court rejected the argument that the "public interest" in the context of Exemption 7(C) requires an assessment of the specific purpose for which the document is sought.[37] Instead, the Court held that the "public interest" depended solely on the nature of the document sought and its relationship to "the basic purpose [of the FOIA] 'to open agency action to the light of public scrutiny.'"[38] The Court concluded that the FOIA's "core purposes" would not be furthered by disclosure of a record about a private individual, even if it "would provide details to include in a news story, [because] this is not the kind of public interest for which Congress enacted the FOIA."[39] It also emphasized that a particular FOIA requester's intended use of the requested information "has no bearing on the merits of his or her FOIA request" and that FOIA requesters therefore should be treated alike.[40] (See further discussion of the ramifications of Reporters Committee under Exemption 6, below.)

Although the Supreme Court's decision in Reporters Committee is based

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[34] FBI Agents Ass'n v. FBI, 3 Gov't Disclosure Serv. at 83,565-66; see also Church of Scientology v. IRS, 816 F. Supp. 1138, 1149 (W.D. Tex. 1993) ("public is entitled to know how IRS is allocating" taxpayers' money as it pertains to IRS advance of travel funds to employees); News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. at 1267 (finding legitimate public interest in disclosure of Case Handling Statements despite agency fear that information may be misunderstood or misinterpreted); Globe Newspaper Co. v. FBI, slip op. at 6 (amount paid to FBI informant personally involved in continuing criminal activity should be disclosed because it "falls squarely within the parameters set by Rose"); Singer v. Rourke, No. 87-1213, slip op. at 3-4 (D. Kan. Dec. 30, 1988) (holding Exemption 2 inapplicable to documents relating to investigation of sexual and racial harassment at Air Force facility, because public has "genuine and significant interest" in whether the government has engaged in "such noxious activity").

[35] 721 F.2d at 830-31 n.4.

[36] 489 U.S. 749 (1989).

[37] Id. at 771-72.

[38] Id. at 772 (quoting Department of the Air Force v. Rose, 425 U.S. at 372).

[39] Id. at 774.

[40] Id. at 771; see also FOIA Update, Spring 1989, at 5.

on an analysis of Exemption 7(C), its interpretation of what constitutes "public interest" under the FOIA logically may be applicable under Exemption 2 as well.[41] Since Reporters Committee, courts have increasingly focused upon the lack of any "legitimate public interest" when applying this aspect of the exemption to information found to be related to an agency's internal practices.[42] Indeed, a number of courts had already been taking such an approach in analyzing "low 2" cases before Reporters Committee.[43] Nevertheless, agencies still

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[41] See Schwaner v. Department of the Air Force, 898 F.2d at 800-01 (Revercomb, J., dissenting on issue not reached by majority) (relying on Reporters Committee "core purposes" analysis and finding no "meaningful" public interest in disclosure of names and duty addresses of military personnel).

[42] See Hale v. United States Dep't of Justice, 973 F.2d at 902 (no public interest in administrative markings and notations, personnel directories containing names and addresses of FBI employees, room and telephone numbers, employee identification numbers, consensual monitoring checklist form, rap sheet-dissemination page); News Group Boston, Inc. v. National R.R. Passenger Corp., 799 F. Supp. at 1268 (no public interest in payroll and job title codes); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 390-93 (W.D.N.Y. 1992) (no public interest in "soundex" encoding of alien's family name, whether or not alien is listed in Border Patrol Lookout Book; codes used to identify deportability; narratives explaining circumstances of apprehension; internal routing information); McCoy v. Moschella, No. 89-2155, slip op. at 6 (D.D.C. Sept. 30, 1991) (no public interest in file numbers identifying bank robberies with similar patterns).

[43] See, e.g., Martin v. Lauer, 686 F.2d at 34 (Exemption 2 "designed to screen out illegitimate public inquiries into the functioning of an agency"); Lesar v. United States Dep't of Justice, 636 F.2d at 485-86 (public has "no legitimate interest" in FBI's mechanism for internal control of informant identities); Hall v. United States Dep't of Justice, No. 87-474, slip op. at 4-5 (D.D.C. Mar. 8, 1989) (magistrate's partial recommendation) (plaintiff failed to offer "a single legitimate interest" to justify public access to teletype routing symbols and data entry codes maintained by Marshals Service), adopted (D.D.C. July 31, 1989); Gonzalez v. United States Dep't of Justice, No. 88-913, slip op. at 2-3 (D.D.C. Oct. 25, 1988) (source symbol numbers); Lam Lek Chong v. DEA, No. 85-3726, slip op. at 11 (D.D.C. Mar. 14, 1988) (same), aff'd on other grounds, 929 F.2d 729 (D.C. Cir. 1991); Heller v. United States Marshals Serv., 655 F. Supp. at 1092; Struth v. FBI, 673 F. Supp. 949, 959 (E.D. Wis. 1987) (plaintiff offered no evidence of public interest in source symbol or source file numbers); White v. United States Dep't of Justice, slip op. at 6 ("Exemption 2 is designed . . . to screen out illegitimate public inquiries into the functioning of an agency."); Fiumara v. Higgins, 572 F. Supp. 1093, 1102 (D.N.H. 1983) (plaintiff failed to show legitimate public or private interest in disclosure of agency's law enforcement computer system information); Texas Instruments, Inc. v. United States Customs Serv., 479 F. Supp. 404, 406-07 (D.D.C. 1979) (internal access or report numbers of no value to plaintiff). But cf. Tax Analysts v. United States Dep't of Justice, 845 F.2d 1060, 1064 n.8 (D.C. Cir. 1988) (pre-Reporters Committee case finding

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must be mindful of the fact that the special protection of "low 2" simply is not available for any information in which there is "a genuine and significant public interest."[44]

"High 2": Risk of Circumvention

The second category of information withholdable under Exemption 2--internal matters of a more substantial nature the disclosure of which would risk the circumvention of a statute or agency regulation--has generated considerable controversy. In Department of the Air Force v. Rose[45] the Supreme Court specifically left open the question of whether such records fall within the coverage of Exemption 2. Most of the cases first developed this aspect of the exemption in the context of law enforcement manuals containing sensitive staff instructions. For example, the position adopted by the Court of Appeals for the Eighth Circuit on this subject is that Exemption 2 does not relate to such matters, but that section (a)(2)(C) of the FOIA,[46] which arguably excludes law enforcement manuals from the automatic disclosure provisions of the FOIA, bars disclosure of manuals whose release to the public would significantly impede the law enforcement process.[47] Although tacitly approving the Eighth Circuit's argument, the Courts of Appeals for the Fifth and Sixth Circuits have an alternative rationale for withholding law enforcement manuals: Disclosure would allow persons "simultaneously to violate the law and to avoid detection" by impeding law enforcement efforts.[48]

The majority of the courts in other circuits, however, have placed greater weight on the House Report in this respect and accordingly have held that Exemption 2 is applicable to a wide range of internal administrative and personnel matters, including law enforcement manuals, to the extent that disclosure would risk circumvention of an agency regulation or statute or impede the effectiveness of an agency's law enforcement activities.[49]

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[43](...continued)
Exemption 2 inapplicable, without discussion, because of "public's obvious interest" in agency copies of court opinions), aff'd on other grounds, 492 U.S. 136 (1989).

[44] Department of the Air Force v. Rose, 425 U.S. at 369; see also FOIA Update, Winter 1984, at 11 (emphasizing "low threshold" for disclosure of such information).

[45] 425 U.S. 352, 364, 369 (1976).

[46] 5 U.S.C. § 552(a)(2)(C) (1988).

[47] See Cox v. Levi, 592 F.2d 460, 462-63 (8th Cir. 1979); Cox v. United States Dep't of Justice, 576 F.2d 1302, 1306-09 (8th Cir. 1978).

[48] Hawkes v. IRS, 467 F.2d 787, 795 (6th Cir. 1972); Sladek v. Bensinger, 605 F.2d 899, 902 (5th Cir. 1979).

[49] See, e.g., Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d
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The Court of Appeals for the District of Columbia Circuit adopted this majority approach when the full court addressed the issue in Crooker v. Bureau of Alcohol, Tobacco & Firearms, a case involving a law enforcement agents' training manual.[50] Although not explicitly overruling the holding in Jordan v. United States Department of Justice that guidelines for the exercise of prosecutorial discretion were not properly withholdable,[51] the en banc decision in Crooker specifically rejected the rationale of Jordan that Exemption 2 cannot protect law enforcement manuals or other documents whose disclosure would risk circumvention of the law.[52]

In Crooker, the D.C. Circuit fashioned a two-part test for determining which sensitive materials are exempt from mandatory disclosure under Exemption 2. This test requires both:

(1) that a requested document be "predominantly internal" and

(2) that its disclosure "significantly risks circumvention of agency regulations or statutes."[53]

Of course, whether there is any public interest in disclosure is entirely irrelevant under this "circumvention" aspect of Exemption 2.[54] Rather, the concern in such a case is that a FOIA disclosure should not "benefit those attempting to

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[49](...continued)
653, 656 (9th Cir. 1980); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 547 (2d Cir. 1978); Wilder v. IRS, 607 F. Supp. 1013, 1015 (M.D. Ala. 1985); Ferri v. Bell, No. 78-841, slip op. at 7-9 (M.D. Pa. Dec. 15, 1983); Fiumara v. Higgins, 572 F. Supp. 1093, 1102 (D.N.H. 1983); see also Watkins v. Commissioner, No. C81-0091J, slip op. at 1 (D. Utah Mar. 29, 1982) (criteria for administrative or judicial enforcement actions found protectible).

[50] 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc).

[51] 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc).

[52] See 670 F.2d at 1074.

[53] Id. at 1073-74.

[54] See Kaganove v. EPA, 856 F.2d 884, 888-89 (7th Cir. 1988), cert. denied, 448 U.S. 1011 (1989); Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. 3, 5 (D.D.C. 1987). But see Wilkinson v. FBI, 633 F. Supp. 336, 342 (C.D. Cal. 1986) (suggesting that charge that underlying investigation was conducted illegally might render exemption inapplicable); Kaganove v. EPA, 856 F.2d at 889 (suggesting that document may not meet Crooker test if its purpose were not "legitimate"); Oatley v. United States, 3 Gov't Disclosure Serv. (P-H) ¶ 83,274, at 84,065 (D.D.C. Aug. 16, 1983) (holding that civil service testing materials satisfy two-part Crooker test, but leaving open possibility that information would not be considered predominantly internal if grounds existed to suspect bias on the basis of race or sex in materials).

violate the law and avoid detection."[55] As the D.C. Circuit recognized, this is simply a matter of "common sense."[56]

In the years since Crooker, a growing body of decisions has expressly applied both parts of this test, providing some guidance as to the kinds of information that will qualify for protection under these standards.[57] Courts in other circuits have followed similar tests, all containing an element similar to the "risk of circumvention" factor critical to the D.C. Circuit's Crooker analysis.[58]

With respect to the first part of the Crooker test, it is fairly easy in practice to meet the requirement that the materials be "predominantly internal." Although the standard initially appeared difficult to define, particularly in view of the implication in the majority opinion in Crooker that prosecutorial guidelines do not meet this requirement,[59] subsequent decisions have suggested otherwise. For example, the standard of "predominant internality" has been held not to exclude from protection even a document distributed to 1700 state, federal and foreign agencies when the dissemination was necessary for maximum law enforcement effectiveness and access to the general public was stringently denied.[60] Specific guidance on what constitutes an "internal" document may be found in Cox v. United States Department of Justice, which held protectible information which

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[55] Crooker, 670 F.2d at 1054.

[56] Id. at 1074.

[57] See, e.g., National Treasury Employees Union v. United States Customs Serv., 802 F.2d 525, 528 (D.C. Cir. 1986); Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5; Wilder v. IRS, 607 F. Supp. at 1015; Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 411-13 (D.D.C. 1983).

[58] See, e.g., Dirksen v. HHS, 803 F.2d 1456, 1458 (9th Cir. 1986) (citing Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d at 657); Caplan v Bureau of Alcohol, Tobacco & Firearms, 587 F.2d at 547; Irons v. FBI, No. 82-1143, slip op. at 2 (D. Mass. Mar. 31, 1986), rev'd & remanded on other grounds, 811 F.2d 681 (1st Cir. 1987).

[59] See 670 F.2d at 1075.

[60] See Shanmugadhasan v. United States Dep't of Justice, No. 84-0079, slip op. at 31-34 (C.D. Cal. Feb. 18, 1986) (portions of DEA periodical discussing drug enforcement techniques and exchange of information held protectible); see also Kaganove v. EPA, 856 F.2d at 889 (EPA, like any employer, "reasonably would expect" an applicant rating plan to be internal); National Treasury Employees Union v. United States Customs Serv., 802 F.2d at 531 (appointment of individual members of the lower federal bureaucracy is primarily question of internal significance for agencies involved); Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5 ("[I]t is difficult to conceive of a document that is more 'predominantly internal' than a guide by which agency personnel classify documents.").

> does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public. Differently stated, the unreleased information is not "secret law," the primary target of [the FOIA's] disclosure provisions.[61]

Last year, however, the District Court for the District of Columbia held that a computer algorithm used by the Department of Transportation to determine the safety rating for motor carriers is "not purely internal because its effect and the legal status it imposes on carriers are adopted by other agencies without further analysis or discretion."[62] In a second case, that same court held that documents relating to the procurement of telecommunications services by the federal government could not qualify as "primarily" internal given the project's "massive" scale and significance.[63]

No other court has declined to extend "high 2" protection to any document for its lack of "predominant internality," perhaps reflecting a measure of deference that is implicitly accorded to agencies under this substantive aspect of Exemption 2.[64] Courts have uniformly treated a wide variety of information pertaining to law enforcement activities as "internal," including:

(1) general guidelines for conducting investigations;[65]

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[61] 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam).

[62] Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992).

[63] MCI Telecommunications Corp. v. GSA, No. 89-746, slip op. at 11-12 (D.D.C. Mar. 25, 1992).

[64] See Schwaner v. Department of the Air Force, 898 F.2d 793, 796 (D.C. Cir. 1990) ("Judicial willingness to sanction a weak relation to 'rules and practices' may be greatest when the asserted government interest is relatively weighty.").

[65] See, e.g., PHE, Inc. v. United States Dep't of Justice, 983 F.2d 248, 251 (D.C. Cir. 1993) ("[R]elease of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts."); Becker v. IRS, No. 91-C-1203, slip op. at 15 n.1 (N.D. Ill. Mar. 27, 1992) (exemption protects operational rules, guidelines, and procedures for law enforcement investigations and examinations) (appeal pending); Wilder v. Commissioner, 601 F. Supp. 241, 242-43 (M.D. Ala. 1984) (agreement between state and federal agencies concerning when to exchange information relevant to potential violations of tax laws held "predominantly internal" because it did not interpret substantive law, but instead governed exchange of information); Goldsborough v. IRS, No. 81-1939, slip op. at 15-16 (D. Md. May 10, 1984) (protecting law enforcement manual setting out guidelines to be used in criminal investigation); Berkosky v. Department of Labor, No. 82-6464, slip op. at 3 (C.D. Cal. May

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(2) guidelines for conducting post-investigation litigation;[66]

(3) guidelines for identifying law violators;[67]

(4) a study of agency practices and problems pertaining to undercover agents;[68] and

(5) sections of a Bureau of Prisons manual which summarize procedures for security of prison control centers, including escape prevention plans, control of keys and locks within a prison, instructions regarding transportation of federal prisoners and the arms and defensive equipment inventory maintained in the facility.[69]

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[65](...continued)
2, 1984) (holding that guidance for proper conduct of investigation of government contractor is designed solely to instruct investigators and does not "regulate the public").

[66] See, e.g., Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (exemption protects litigation strategy pertaining to Equal Access to Justice Act because disclosure would render information "operationally useless"); Silber v. United States Dep't of Justice, No. 91-876, transcript at 21 (D.D.C. Aug. 13, 1992) (bench order) (disclosure of agency's fraud litigation monograph would allow access to strategies and theories of government litigation and its efforts to enforce False Claims Act).

[67] See, e.g., Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 393 (W.D.N.Y. 1992) (methods of apprehension and statement of ultimate disposition of case); Williston Basin Interstate Pipeline Co. v. Federal Energy Regulatory Comm'n, No. 88-592, slip op. at 3-4 (D.D.C. Apr. 17, 1989) (portions of audit report held to be "functional equivalent" of investigative techniques manual, and thus protectible under Exemptions 2 and 7(E), because disclosure would reveal techniques used by agency personnel to ascertain whether plaintiff was in compliance with federal law); Fund for a Conservative Majority v. Federal Election Comm'n, No. 84-1342, slip op. at 4 (D.D.C. Feb. 26, 1985) (audit criteria not "secret law" because they merely observe public behavior for illegal activity and do not define illegal activity); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 412 (computer program protected under Exemptions 2 and 7(E) because it merely instructs computer how to detect possible law violations, rather than modifying or regulating public behavior); Zorn v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 82,240, at 82,664 (D.D.C. Mar. 19, 1982) (guidelines for identifying tax protester churches held not "secret law").

[68] See Cox v. FBI, No. 83-3552, slip op. at 1 (D.D.C. May 31, 1984) (holding that report concerning undercover agents had no effect on public and contained no "secret law"), appeal dismissed, No. 84-5364 (D.C. Cir. Feb. 28, 1985).

[69] Miller v. Department of Justice, No. 87-533, slip op. at 1-2 (D.D.C. Jan. 31, 1989).

EXEMPTION 2

More case law exists on what constitutes circumvention of legal requirements, because in many instances the "internality" of the documents is simply assumed. Most fundamentally, records that reveal the nature and extent of a particular investigation repeatedly have been held protectible on this "circumvention" basis.[70] On a point of increasing significance, the nondisclosure of computer codes used by law enforcement agencies that might provide the sophisticated requester with access to information concerning agency investigations stored in a computer system likewise has been upheld on this basis.[71]

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[70] See, e.g., Albuquerque Publishing Co. v. United States Dep't of Justice, 726 F. Supp. 851, 854 (D.D.C. 1989) ("The public has no legitimate interest in gaining information [pertaining to violator and informant codes] that could lead to the impairment of DEA investigations."); Barkett v. United States Dep't of Justice, No. 86-2029, slip op. at 2-3 (D.D.C. July 18, 1989) (release of G-DEP and NADDIS index numbers might severely hamper DEA's enforcement and investigatory activities); Simpson v. United States Dep't of Justice, No. 87-2832, slip op. at 3-4 (D.D.C. Sept. 30, 1988) (disclosure of G-DEP and NADDIS numbers would allow suspects to evade apprehension by changing their criminal activity, while release of informant codes would "jeopardize . . . investigations by frightening away" and endangering the lives of potential DEA informants); Webster v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,195, at 83,876 (D.D.C. June 2, 1983) (G-DEP and NADDIS index numbers); Ferri v. Bell, No. 78-841, slip op. at 9, 11 (M.D. Pa. Dec. 15, 1983) (disclosure of charge-out cards for electronic surveillance devices would impede the FBI's law enforcement effectiveness; however, purchase records of electronic surveillance equipment must be released because FBI has not demonstrated that release would similarly frustrate its effectiveness); White v. United States Dep't of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,127, at 83,740 n.6 (D.D.C. Mar. 2, 1983) (release of Bureau of Prisons memorandum regarding telephone surveillance might risk circumvention of agency regulations). But see also KTVK-TV v. DEA, No. 89-379, slip op. at 1-3 (D. Ariz. Aug. 30, 1989) (ordering disclosure of tape of speech by local police chief, given at seminar sponsored by DEA, which contained remarks on police department programs used or contemplated to discourage illegal drug use--finding that "disclosure of any of these programs would tend to discourage illegal use of drugs").

[71] See, e.g., Dirksen v. HHS, 803 F.2d at 1459 (instructions for computer coding protected); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d 979, 982 (1st Cir. 1985) (computer codes protected); Allen v. Bureau of Alcohol, Tobacco & Firearms, No. 91-2640, slip op. at 1-2 (D.D.C. June 30, 1992) (protection of computer codes, symbols and numbers used in law enforcement communications system), summary affirmance granted, No. 92-5312 (D.C. Cir. May 25, 1993); Hall v. United States Dep't of Justice, No. 87-474, slip op. at 4-5 (D.D.C. Mar. 8, 1989) (teletype routing symbols, access codes and data entry codes protected); Laroque v. United States Dep't of Justice, No. 86-2677, slip op. at 2 (D.D.C. July 12, 1988) (computer systems ID numbers and entry station numbers); Bennett v. Department of Justice, No. 86-891, slip op. at 1 (D.D.C. Oct. 28, 1986) (computer code); Rizzo v. United States Dep't of Justice, No. 84-2091, slip op. at 3-4 (D.D.C. Feb. 25, 1985) (teletype rout-

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Exemption 2's "circumvention" protection also should be readily applicable to vulnerability assessments, which are perhaps the quintessential type of record warranting protection on that basis. Such records generally assess an agency's vulnerability (or that of another institution) to some form of outside interference or harm, by identifying those programs or systems deemed the most sensitive and describing specific security measures that can be used to counteract such vulnerabilities.[72] A prime example of vulnerability assessments warranting protection under "high 2" are the computer security plans that all federal agencies are now required by law to prepare.[73] In a recent decision involving such a document, Schreibman v. United States Department of Commerce,[74] Exemption 2 coverage was invoked to prevent unauthorized access to information which could result in "alternation [sic], loss, damage or destruction of data contained in the computer system."[75] It should be remembered, however, that even such a sensitive document must be reviewed to determine whether any "reasonably segregable" portion can be disclosed without harm.[76]

Affording Exemption 2 protection to vulnerability studies such as these would follow the line of cases in which courts have already applied the "circumvention" prong to items of sensitive computer-related information.[77] In one such case, involving a sensitive computer program found protectible under "high 2," the court observed that disclosure would be like "putting a fox inside

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[71](...continued)
ing codes); Fiumara v. Higgins, 572 F. Supp. at 1102 (disclosure of access codes to the Treasury Enforcement Communication System "might enable outsiders to circumvent agency functions"); see also Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 412 (computer program withheld under Exemptions 2 and 7(E)); Kiraly v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 82,465, at 83,135 (N.D. Ohio Feb. 17, 1982) (computer codes withheld under a combination of Exemptions 2 and 7(E)), aff'd, 728 F.2d 273 (6th Cir. 1984).

[72] See FOIA Update, Summer 1989, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two").

[73] See id. at 4 (citing Computer Security Act of 1987, Pub. L. No. 100-235, 101 Stat. 1724 (1988)).

[74] 785 F. Supp. 164 (D.D.C. 1991).

[75] Id. at 166.

[76] Id.; see also PHE, Inc. v. United States Dep't of Justice, 983 F.2d at 252 (remanding for "high 2" segregration; "district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability" (citing Schiller v. NLRB, 964 F.2d at 1210)); Wightman v. Bureau of Alcohol, Tobacco & Firearms, 755 F.2d at 982-83 (remanding for determination on segregability).

[77] See, e.g., Hall v. United States Dep't of Justice, slip op. at 4-5 (protecting various items that "could facilitate unauthorized access to [agency] communications systems").

the chicken coop."[78] The "circumvention" protection of Exemption 2 is well designed to prevent such a result.[79] However, in an exceptional decision, one court refused to apply this aspect of Exemption 2 to procedures designed to protect against states "circumventing" federal audit criteria for welfare reimbursement.[80]

Release of various other categories of information also has been found likely to result in harmful circumvention:

(1) information that would reveal the identities of informants;[81]

(2) information that would reveal the identities of undercover agents;[82]

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[78] Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 413.

[79] See, e.g., Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5 (according Exemption 2 protection to record revealing most sensitive portions of agency system which "could be used to seek out the [system's] vulnerabilities"); see also FOIA Update, Summer 1989, at 3-4.

[80] See Massachusetts v. HHS, 727 F. Supp. 35, 42 (D. Mass. 1989) ("The Act simply cannot be interpreted in such a way as to presumptively brand a sovereign state as likely to circumvent federal law. The second prong of Exemption 2 does not apply when it is [the state] itself that seeks the information.").

[81] See, e.g., Lesar v. United States Dep't of Justice, 636 F.2d 472, 486 (D.C. Cir. 1980) (informant codes); Durham v. United States Dep't of Justice, No. 91-2636, slip op. at 3-4 (D.D.C. Aug. 17, 1993) (informant symbol numbers); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 787 (D.D.C. 1993) (disclosure of code used to evaluate informants) (appeal pending); Curcio v. FBI, No. 89-941, slip op. at 4-5 (D.D.C. Nov. 2, 1990) (symbols identifying confidential informants and source-symbol file numbers); Faris v. United States Dep't of Justice, No. 88-2329, slip op. at 4 (D.D.C. June 16, 1989) (informant file numbers and codes); Gonzalez v. United States Dep't of Justice, No. 88-913, slip op. at 2-3 (D.D.C. Oct. 25, 1988) (informant symbols); Struth v. FBI, 673 F. Supp. 949, 959 (E.D. Wis. 1989) (informant file numbers and codes); Wilkinson v. FBI, 633 F. Supp. at 341-42 (informant codes); Rizzo v. FBI, No. 83-1924, slip op. at 3 (D.D.C. Feb. 10, 1984) (source symbols); Malizia v. United States Dep't of Justice, 519 F. Supp. 338, 344 (S.D.N.Y. 1981) (source numbers and identifying information). But see also Globe Newspaper Co. v. FBI, No. 91-13257, slip op. at 7-8 (D. Mass. Dec. 29, 1992) (amount paid to FBI informant personally involved in continuing criminal activity ordered released).

[82] See Cox v. FBI, slip op. at 2 (report concerning FBI's undercover agent program protected because of potential for discovering identities of agents).

(3) sensitive administrative notations in law enforcement files;[83]

(4) security techniques used in prisons;[84]

(5) agency audit guidelines;[85]

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[83] See, e.g., Founding Church of Scientology v. Smith, 721 F.2d 828, 831 (D.C. Cir. 1983) (protecting sensitive instructions regarding administrative handling of document); Curcio v. FBI, slip op. at 5 (protecting expense accounting in FBI criminal investigation); Meeropol v. Smith, No. 75-1121, slip op. at 47-48 (D.D.C. Feb. 29, 1984) (release of handling and dissemination instructions could jeopardize the means by which FBI has transmitted certain sensitive intelligence information), aff'd in part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

[84] See, e.g., Cox v. United States Dep't of Justice, 601 F.2d at 4-5 (weapon, handcuff and transportation security procedures); Powell v. Department of Justice, No. 86-2020, slip op. at 4 (D.D.C. Oct. 31, 1989) (records relating to prisoner security procedures), summary affirmance granted, No. 89-5447 (D.C. Cir. June 28, 1991); Hall v. United States Dep't of Justice, slip op. at 4-5 (disclosure of teletype routing symbols, access codes and data entry codes maintained by the Marshals Service "could facilitate unauthorized access to information in law enforcement communications systems, and [thereby] jeopardize [prisoners' security]"); Miller v. Department of Justice, slip op. at 1-3 (disclosure of sections of Bureau of Prisons Custodial Manual describing procedures for security of prison control centers would "necessarily facilitate efforts by inmates to frustrate [BOP's] security precautions"); Crooker v. Federal Bureau of Prisons, No. 86-510, slip op. at 3-4 (D.D.C. Feb. 27, 1987) (general prison post orders, handcuff procedures, security and arming of officers, and alarm procedures); Cox v. Bureau of Prisons, No. 83-1032, slip op. at 1 (D.D.C. July 19, 1983) (release of Central Inmate Monitoring Manual would create significant risk of circumvention of agency regulations designed to safeguard security of inmates), appeal dismissed, No. 83-1859 (D.C. Cir. Oct. 20, 1983); cf. Thornburgh v. Abbott, 490 U.S. 401, 417 (1989) (rejecting constitutional challenge to Bureau of Prisons regulation excluding any publications that, although not necessarily likely to lead to violence, are determined by warden "to create an intolerable risk of disorder . . . at a particular prison at a particular time") (non-FOIA case).

[85] See, e.g., Dirksen v. HHS, 803 F.2d at 1458-59 (internal audit guidelines protected in order to prevent risk of circumvention of agency Medicare reimbursement regulations); Archer v. HHS, 710 F. Supp. 909, 911 (S.D.N.Y. 1989) (Medicare reimbursement-review criteria ordered disclosed, but with deletion of specific number that triggers audit); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. at 412-13 (computer program containing anti-dumping detection criteria properly withheld). But see Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. at 200 (knowing agency's regulatory priorities would allow regulated carriers to concentrate efforts on correcting most serious safety breaches).

(6) agency testing materials;[86] and

(7) an agency's unclassified manual detailing the categories of information that are classified and their corresponding classification levels.[87]

Under some circumstances, Exemption 2 may be applied to prevent potential circumvention through a "mosaic" approach: Information which would not by itself reveal sensitive law enforcement information can nonetheless be protected to prevent damage that could be caused by the assembly of different pieces of similar information by a requester.[88] This circumstance arose in three cases involving requests for "Discriminant Function Scores"--scores used by the Internal Revenue Service to select returns for examination. Although the IRS concedes that release of any one individual's tax score would not disclose how tax returns are selected for audit, it takes the position that the routine release of such scores would enable the sophisticated requester to discern, in the aggregate, its audit criteria, thus facilitating circumvention of the tax laws; all three courts accepted this rationale as an appropriate basis for affording protection under Exemption 2.[89] In a related case, one court upheld the denial of

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[86] See, e.g., Patton v. FBI, 626 F. Supp. 445, 447 (M.D. Pa. 1985) (testing materials withheld under Privacy Act Exemption (k)(6) and FOIA Exemption 2 because release would impair effectiveness of system and give future applicants unfair advantage), aff'd, 782 F.2d 1030 (3d Cir. 1986) (table cite); Oatley v. United States, 3 Gov't Disclosure Serv. at 84,065 (civil service testing materials satisfy the two-part Crooker test); see also Kaganove v. EPA, 856 F.2d at 890 (disclosure of applicant rating plan would render it ineffectual and allow future applicants to "embellish" job qualifications); National Treasury Employees Union v. United States Customs Serv., 802 F.2d at 528-29 (disclosure of hiring plan would give unfair advantage to some future applicants). But see also Commodity News Serv., Inc. v. Farm Credit Admin., No. 88-3146, slip op. at 13-15 (D.D.C. July 31, 1989) (steps to be taken in selecting receiver for liquidation of failed federal land bank, including sources agency might contact when investigating candidates, not protectible under "high 2" because agency did not demonstrate how disclosure would allow any applicant to "gain an unfair advantage in the . . . process").

[87] Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5. But see Wilkinson v. FBI, 633 F. Supp. at 342 & n.13 (codes that identify law enforcement techniques not protectible under Exemption 2; instead must meet threshold requirement of compilation for law enforcement purposes for protection under Exemption 7(E)).

[88] See, e.g., Jan-Xin Zang v. FBI, 756 F. Supp. 705, 712 (W.D.N.Y. 1991) (source symbol and administrative identifiers withheld on basis that "accumulation of information" known to be from same source could lead to detection).

[89] See Burns v. IRS, No. 85-1027, slip op. at 8 (D. Ariz. Oct. 16, 1985), dismissed on procedural grounds, No. 85-2833 (9th Cir. Sept. 12, 1986); Ray v. United States Customs Serv., No. 83-1476, slip op. at 8-9 (D.D.C. Jan. 28,

(continued...)

access to an IRS memorandum containing tolerance criteria used by the agency in its investigations, finding that disclosure would "undermine the enforcement of . . . internal revenue laws."[90]

Although originally, as in Crooker, the "circumvention" protection afforded by Exemption 2 was applied almost exclusively to sensitive portions of criminal law enforcement manuals, it has since been extended to civil enforcement and regulatory matters.[91] Most significantly, "high 2" protection has further been extended to matters that have nothing to do with law enforcement in any ordinary sense. In a pivotal case in this regard, the National Treasury Employees Union sought documents known as "crediting plans," records used to evaluate the credentials of federal job applicants; the Customs Service successfully argued that disclosure of the plans would make it difficult to evaluate the applicants because they could easily exaggerate or even fabricate their qualifications, such falsifications would go undetected because the government lacked the resources necessary to verify each application, and unscrupulous future applicants could thereby gain an unfair competitive advantage.[92] The D.C. Circuit approved the withholding of such criteria under a refined application of Crooker, which focused directly on its second requirement, and held that the potential for circumvention of the selection program, as well as the general statutory and regulatory mandates to enforce applicable civil service laws, was sufficient to bring the information at issue within the protection of Exemption 2.[93] The agency demonstrated "circumvention" by showing that disclosure would either render the documents obsolete for their intended pur-

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[89](...continued)
1985); Wilder v. Commissioner, 607 F. Supp. at 1015; accord Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. at 5 (classification guidelines could reveal which parts of sensitive communications system are most sensitive and enable foreign intelligence services to gather related unclassified records and seek out system's vulnerabilities); cf. Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) ("mosaic" analysis in Exemptions 1 and 3 context).

[90] O'Connor v. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988). But see also Archer v. HHS, 710 F. Supp. at 911 (requiring careful segregation so that only truly sensitive portion of audit criteria is withheld).

[91] See, e.g., Dirksen v. HHS, 803 F.2d at 1458-59 (guidelines for processing Medicare claims properly withheld where disclosure could allow applicants to alter their claims to fit them into certain categories and guidelines would thus "lose the utility they were intended to provide"); Archer v. HHS, 710 F. Supp. at 911 (specific number of "nerve blocks" used by HHS contractor to determine whether health care providers' claims for reimbursement under Medicare should be subjected to greater scrutiny held protectible, because disclosure would allow providers "to avoid review and ensure automatic payment by submitting claims below the number . . . scrutinized [by agency's contractor]").

[92] National Treasury Employees Union v. United States Customs Serv., 802 F.2d at 528-29.

[93] Id. at 529-31.

pose, make the plan's criteria "operationally useless" or compromise the utility of the selection program.[94]

This approach has been expressly followed by the Court of Appeals for the Seventh Circuit in Kaganove v. EPA to withhold from an unsuccessful job applicant the agency's merit promotion rating plan on the basis that disclosure of the plan "would frustrate the document's objective [and] render it ineffectual" for the very reasons noted in the National Treasury Employees Union v. United States Customs Service case.[95]

It is also quite noteworthy that the Seventh Circuit in Kaganove v. EPA,[96] the Court of Appeals for the Ninth Circuit in Dirksen v. HHS,[97] and the D.C. Circuit in National Treasury Employees Union v. United States Customs Service,[98] all reached their results even in the absence of any particular agency regulation or statute to be circumvented. Thus, it now seems clear that the second part of the Crooker test can properly be satisfied by a showing that disclosure would risk circumvention of legal requirements generally.[99]

Finally, with the enactment of the Freedom of Information Reform Act of 1986, many of the materials heretofore protectible only on a "high 2" basis now may also be protectible under Exemption 7(E).[100] Post-amendment cases have held such information to be exempt from disclosure under both Exemption 2

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[94] Id. at 530-31; cf. United States Dep't of Justice v. FLRA, 988 F.2d 1267, 1269 (D.C. Cir. 1993) (crediting plans also held exempt from disclosure under Federal Service Labor-Management Relations Act).

[95] Kaganove v. EPA, 856 F.2d at 889.

[96] Id.

[97] 803 F.2d at 1458-59.

[98] 802 F.2d at 529-31.

[99] See National Treasury Employees Union v. United States Customs Serv., 802 F.2d at 530-31 ("Where disclosure of a particular [record] would render [it] operationally useless, the Crooker analysis is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure."); see, e.g., Knight v. DOD, No. 87-480, slip op. at 4 (D.D.C. Feb. 11, 1988) (memorandum detailing specific inventory audit guidelines held protectible because disclosure "would reveal Department of Defense rationale and strategy" for audit and would "create a significant risk that this information would be used by interested parties to frustrate ongoing or future audits"); Boyce v. Department of the Navy, No. 86-2211, slip op. at 2 (C.D. Cal. Feb. 17, 1987) (withholding routine hearing transcript under Exemption 2 where disclosure would circumvent terms of mere contractual agreement entered into under labor-relations statutory scheme); see also FOIA Update, Summer 1989, at 4.

[100] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 16-17 & n.32 (Dec. 1987); see also Kaganove v. EPA, 856 F.2d at 888-89.

and Exemption 7(E).[101] While Exemption 2 must still be used if any information fails to meet Exemption 7's "law enforcement" threshold, Exemption 2's history and judicial interpretations should be helpful in applying Exemption 7(E). (See discussion of Exemption 7(E), below.)

EXEMPTION 3

Exemption 3 of the FOIA incorporates the disclosure prohibitions that are contained in various other federal statutes. As originally enacted in 1966, Exemption 3 protected information "specifically exempted from disclosure by statute."[1] The Supreme Court, in FAA v. Robertson, interpreted this language as evincing a congressional intent to allow statutes which permitted the withholding of confidential information, and which were enacted prior to the FOIA, to remain unaffected by the disclosure mandate of the FOIA. In so reading the exemption, the Court held that a withholding provision in the Federal Aviation Act which delegated almost unlimited discretion to agency officials to withhold specific documents in the "interest of the public" was incorporated within Exemption 3.[2] Fearing that this interpretation would allow agencies to evade the Act's disclosure intent, Congress in effect overruled Robertson by amending Exemption 3 in 1976.[3]

As amended, Exemption 3 allows the withholding of information prohibited from disclosure by another statute if one of two disjunctive requirements are met: that the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[4] A statute thus falls within the exemption's coverage if it satis-

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[101] See PHE, Inc. v. United States Dep't of Justice, 983 F.2d at 251 (release of "who would be interviewed, what could be asked, and what records or other documents would be reviewed" in FBI investigatory guidelines would risk circumvention of law); Silber v. United States Dep't of Justice, transcript at 21 (disclosure of agency litigation tactics and strategy would create a significant risk of circumvention of agency regulations by enhancing adversary's posture); Williston Basin Interstate Pipeline Co. v. Federal Energy Regulatory Comm'n, slip op. at 4-5 (identities of auditors, "purpose, source and conclusion" portions of audit reports and section abstracts consisting of auditors' discussions of investigative techniques protectible under both exemptions); O'Connor v. IRS, 698 F. Supp. at 206-07 (memorandum containing criteria used internally by IRS in investigations).

[1] 5 U.S.C. § 552(b)(3) (1966) (amended 1976).

[2] 422 U.S. 255, 266 (1975).

[3] Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241, 1247 (1976).

[4] 5 U.S.C. § 552(b)(3) (1988) (emphasis added).

fies any one of its disjunctive requirements.[5]

Initial Considerations

The determination as to whether a statute meets the threshold requirement of being a nondisclosure statute is subject to strict scrutiny. The Court of Appeals for the District of Columbia Circuit has held that records may be withheld under the authority of another statute pursuant to Exemption 3 "if--and only if--that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure."[6] The D.C. Circuit emphasized that:

> a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose in the actual words of the statute (or at least in the legislative history of FOIA)--not in the legislative history of the claimed withholding statute, nor in an agency's interpretation of the statute.[7]

That is not to say that the breadth and reach of the disclosure prohibition must be found on the face of the statute, but that the statute must at least "explicitly deal with public disclosure."[8] (Previously, the D.C. Circuit had found legislative history probative on the issue of whether an enactment was intended to serve as a withholding statute within the meaning of Exemption 3.[9]) In any event, though, the legislative history of a newly enacted Exemption 3

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[5] See American Jewish Congress v. Kreps, 574 F.2d 624, 628 (D.C. Cir. 1978); see also Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984); Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980).

[6] Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Cal-Almond, Inc. v. United States Dep't of Agric., 960 F.2d 105, 108 (9th Cir. 1992) (language must specifically prohibit disclosure, not merely prohibit expenditure of funds used in releasing information).

[7] Reporters Comm., 816 F.2d at 735; see also Anderson v. HHS, 907 F.2d 936, 951 n.19 (10th Cir. 1990) (agency interpretation of statute not entitled to deference in determining whether statute qualifies under Exemption 3). But see also Meyerhoff v. EPA, 958 F.2d 1498, 1501-02 (9th Cir. 1992) (looking to legislative history of withholding statute to determine that statutory amendment clarified rather than changed it).

[8] Reporters Comm., 816 F.2d at 736. But see also Cal-Almond, Inc. v. United States Dep't of Agric., 960 F.2d at 108 (disclosure prohibition sought to be effectuated through appropriations limitation held inadequate under Exemption 3).

[9] See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1284 (D.C. Cir. 1983).

statute may be considered in determining whether the statute is applicable to matters that are already pending.[10]

Exemption 3 generally is triggered only by federal statutes.[11] Federal rules of procedure, which are promulgated by the Supreme Court, ordinarily do not qualify under Exemption 3.[12] However, when a rule of procedure is subsequently modified and thereby specifically enacted into law by Congress, it may qualify under the exemption.[13] While the issue of whether a treaty can qualify as a statute under Exemption 3 has not yet been ruled upon in any FOIA case, there is a sound policy basis for concluding that a treaty can so qualify.[14]

Once it is established that a statute is a nondisclosure statute and that it meets at least one of the disjunctive requirements of Exemption 3, an agency must also establish that the records in question fall within the protective ambit of the exempting statute.[15] With respect to subpart (B) statutes--which permit agencies some discretion to withhold or disclose records--review under the FOIA of agency action is limited to the determination that the withholding statute qualifies as an Exemption 3 statute and that the records fall within the stat-

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[10] See Long v. IRS, 742 F.2d 1173, 1183-84 (9th Cir. 1984).

[11] See Washington Post Co. v. HHS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,047, at 81,127 n.2 (D.D.C. Dec. 4, 1980) ("an Executive Order . . . is clearly inadequate to support reliance on exemption 3"), rev'd on other grounds, 690 F.2d 252 (D.C. Cir. 1982).

[12] See Founding Church of Scientology v. Bell, 603 F.2d 945, 952 (D.C. Cir. 1979) (Rule 26(c) of the Federal Rules of Civil Procedure, governing issuance of protective orders, held not a statute under Exemption 3).

[13] See, e.g., Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981) (Rule 6(e) of Federal Rules of Criminal Procedure, regulating disclosure of matters occurring before a grand jury, satisfies Exemption 3's "statute" requirement because it was specially amended by Congress in 1977); Berry v. Department of Justice, 612 F. Supp. 45, 49 (D. Ariz. 1985) (Rule 32 of the Federal Rules of Criminal Procedure, governing disclosure of presentence reports, is "statute" for Exemption 3 purposes as it was affirmatively enacted into law by Congress in 1975).

[14] Cf. Whitney v. Robertson, 124 U.S. 190, 194 (1887) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation."); Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385, 388 (D.D.C. 1992) (trade agreement not ratified by Senate does not have status of "statutory law" and thus does not provide Exemption 3 protection).

[15] See, e.g., Public Citizen Health Research Group v. FDA, 704 F.2d at 1284; Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d at 868; Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980).

ute's scope.[16] Beyond this determination, the agency's exercise of its discretion under the withholding statute is governed not by the FOIA, but by the withholding statute itself;[17] judicial review of that should not be within the FOIA's jurisdiction.[18]

Subpart (A)

Rule 6(e) of the Federal Rules of Criminal Procedure,[19] which regulates disclosure of matters occurring before a grand jury, has been held to satisfy the "statute" requirement of Exemption 3 because it was specially amended by Congress in 1977.[20] It is well established that "Rule 6(e) embodies a broad sweeping policy of preserving the secrecy of grand jury material regardless of the substance in which the material is contained."[21] However, defining the parameters of Rule 6(e) protection is not always a simple task and has been the subject of much litigation. In Fund for Constitutional Government v. National Archives & Records Service, the Court of Appeals for the District of Columbia Circuit stated that the scope of the secrecy that must be afforded grand jury material "is necessarily broad" and, consequently, that "it encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal the 'identities of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like.'"[22]

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[16] See Aronson v. IRS, 973 F.2d 962, 967 (1st Cir. 1992); Association of Retired R.R. Workers v. United States R.R. Retirement Bd., 830 F.2d 331, 335 (D.C. Cir. 1987). But see Long v. IRS, 742 F.2d at 1181.

[17] See Aronson v. IRS, 973 F.2d at 966; Association of Retired R.R. Workers, 830 F.2d at 336.

[18] Cf. Roley v. Assistant Attorney Gen., No. 89-2774, slip op. at 8 (D.D.C. Mar. 9, 1990) (court's grant of permission to disclose grand jury records pursuant to Rule 6(e)(C)(i) of the Federal Rules of Criminal Procedure does not govern disposition of same records in FOIA suit); Garside v. Webster, 733 F. Supp. 1142, 1147 (S.D. Ohio 1989) (same). But cf. Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (court's disclosure order pursuant to 38 U.S.C. § 7332(b) (1988) requires VA to disclose records under FOIA).

[19] Fed. R. Crim. P. 6(e).

[20] Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981); see also Watson v. United States Dep't of Justice, 799 F. Supp. 193, 195 (D.D.C. 1992).

[21] Iglesias v. CIA, 525 F. Supp. 547, 556 (D.D.C. 1981).

[22] 656 F.2d at 869 (quoting SEC v. Dresser Indus., 628 F.2d 1368, 1382 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980)); see also McDonnell v. United States, No. 91-5916, slip op. at 30-31 (3d Cir. Sept. 21, 1993) ("[i]nformation and records presented to a federal grand jury . . . names of individuals sub-

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However, neither the fact that information was obtained pursuant to a grand jury subpoena nor the fact that the information was submitted to the grand jury is sufficient, in and of itself, to warrant the conclusion that disclosure is necessarily prohibited by Rule 6(e).[23] Rather, an agency must establish a nexus between the release of that information and "revelation of a protected aspect of the grand jury's investigation."[24] This requirement is particularly pertinent to "extrinsic" documents that were created entirely independently of the grand jury process; for such a document, the D.C. Circuit emphasized in Washington Post Co. v. United States Department of Justice, the required nexus must be apparent from the information itself and "the government cannot immu-

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[22](...continued)
poenaed . . . federal grand jury transcripts of testimony") (to be published); Silets v. United States Dep't of Justice, 945 F.2d 227, 230 (7th Cir. 1991) ("identity of witness before grand jury and discussion of that witness's testimony . . . falls squarely within" Rule 6(e)'s prohibition); Helmsley v. United States Dep't of Justice, No. 90-2413, slip op. at 4-6 (D.D.C. Sept. 25, 1992) (records identifying witnesses who testified or were consulted, documents and evidence not presented but obtained through grand jury subpoenas, immunity applications and orders, exhibit lists, reports and memoranda discussing evidence, correspondence regarding compliance with subpoenas, documents, notes and research relating to litigation regarding compliance with subpoenas, and letters among lawyers discussing grand jury proceedings, all protected by Rule 6(e)); Senate of P.R. v. United States Dep't of Justice, No. 84-1829, slip op. at 13-14 (D.D.C. Apr. 15, 1991) ("charts, maps or documents that were actually created in their entireties in the grand jury room during testimony by witnesses . . . are the closest thing imaginable to an actual transcript of grand jury testimony" and thus are protected).

[23] See Washington Post Co. v. United States Dep't of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988); Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987); see also John Doe Corp. v. John Doe Agency, 850 F.2d 105, 109 (2d Cir. 1988) ("A document that is otherwise available to the public does not become confidential simply because it is before a grand jury."), rev'd on other grounds, 493 U.S. 146 (1989); Astley v. Lawson, No. 89-2806, slip op. at 3-4 (D.D.C. Jan. 11, 1991) (documents ordered released even though requester might have been able to deduce purpose for which records were subpoenaed, because records on their face did not reveal inner workings of grand jury).

[24] Senate of P.R., 823 F.2d at 584; see also Wilson v. Department of Justice, No. 87-2415, slip op. at 4 (D.D.C. June 30, 1993) (Exemption 3 protects from disclosure not only documents presented to grand jury but also those which would reveal government's "audit trail" leading to those documents); Karu v. United States Dep't of Justice, No. 86-771, slip op. at 4-5 (D.D.C. Dec. 1, 1987) (nexus established because "[w]ere this information to be released the very substance of the grand jury proceedings would be discernible"). But see LaRouche v. United States Dep't of Justice, No. 90-2753, slip op. at 9-10 (D.D.C. June 24, 1993) (letter prepared by AUSA discussing upcoming grand jury proceedings held not to reveal inner workings of grand jury).

nize [it] by publicizing the link."[25]

The Supreme Court in Baldrige v. Shapiro,[26] while not actually distinguishing between the two subparts, held that the Census Act[27] is an Exemption 3 statute because it requires that certain data be withheld in such a manner as to leave the Census Bureau with no discretion whatsoever.[28] The Court of Appeals for the Ninth Circuit held that a provision of the Ethics in Government Act of 1978,[29] protecting the financial disclosure reports of special government employees, meets the requirements of subpart (A).[30]

Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964[31] have also been held to meet the subpart (A) requirement because they allow the EEOC no discretion to publicly disclose matters pending before the Commission.[32] Similarly, the statute governing records pertaining to Currency Transaction Reports[33] has been found to meet the requirements of subpart (A).[34] The International Investment Survey Act of 1976[35] has been held to be a subpart (A) statute[36] and certain portions of the overall public disclosure provisions of the Consumer Product Safety Act[37] likewise have been found to amply

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[25] 863 F.2d at 100.

[26] 455 U.S. 345 (1982).

[27] 13 U.S.C. §§ 8(b), 9(a) (1988).

[28] 455 U.S. at 355.

[29] 5 U.S.C. app. § 207(a)(1) (1988 & Supp. IV 1992).

[30] Meyerhoff v. EPA, 958 F.2d 1498, 1502 (9th Cir. 1992) (construing 1978 version of statute). But see Church of Scientology v. IRS, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993) (implying that Ethics in Government Act is subpart (B) statute because FOIA disclosure can be made only if requester meets statute's disclosure requirements) (appeal pending).

[31] 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (1988 & Supp. III 1991).

[32] American Centennial Ins. Co. v. EEOC, 722 F. Supp. 180, 183 (D.N.J. 1989).

[33] 31 U.S.C. § 5319 (1988).

[34] Small v. IRS, 820 F. Supp. 163, 166 (D.N.J. 1992); Vennes v. IRS, No. 5-88-36, slip op. at 6 (D. Minn. Oct. 14, 1988), aff'd, 890 F.2d 419 (8th Cir. 1989) (table cite).

[35] 22 U.S.C. § 3104(c) (1988).

[36] Young Conservative Found. v. United States Dep't of Commerce, No. 85-3982, slip op. at 10-11 (D.D.C. Mar. 25, 1987).

[37] 15 U.S.C. § 2055(a)(2) (1988).

satisfy subpart (A)'s nondisclosure requirements).[38]

Additionally, the Hart-Scott-Rodino Antitrust Improvement Amendments to the Clayton Antitrust Act, prohibiting disclosure of premerger notification materials submitted to the Department of Justice or the FTC,[39] have been held to qualify as a subpart (A) statute,[40] as has a provision of the Antitrust Civil Process Act,[41] which explicitly exempts from the FOIA transcripts of oral testimony taken in the course of investigations under that Act,[42] and section 21(f) of the FTC Act,[43] which expressly exempts from disclosure any material received by the FTC in the course of an FTC investigation authorized by that Act.[44] Likewise, information contained in the Social Security Administration's "Numident system," which was obtained from death certificates provided by state agencies, has been held exempt on the basis of subpart (A) on the grounds that the language of the statute, 42 U.S.C. § 405(r), "leaves no room for agency discretion."[45]

The D.C. Circuit, in a recent decision construing the application of the identical Exemption 3 language of the Government in the Sunshine Act[46] to the Defense Nuclear Facilities Safety Board Act[47] held that the latter statute allows no discretion with regard to the release of the Board's proposed recommendations, thus meeting the requirement of subpart (A).[48] By contrast, the D.C. Circuit found that the statute governing release by the FBI of criminal record

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[38] Mulloy v. Consumer Prod. Safety Comm'n, No. C-2-85-645, slip op. at 2-4 (S.D. Ohio Aug. 2, 1985).

[39] 15 U.S.C. § 18a(h) (1988).

[40] Lieberman v. FTC, 771 F.2d 32, 38 (2d Cir. 1985); Mattox v. FTC, 752 F.2d 116, 121 (5th Cir. 1985).

[41] 15 U.S.C. § 1314(g) (1988).

[42] Motion Picture Ass'n of America v. United States Dep't of Justice, No. 80 Civ. 6612, slip op. at 1 (S.D.N.Y. Oct. 6, 1981).

[43] 15 U.S.C. § 57b-2(f) (1988).

[44] A. Michael's Piano, Inc. v. FTC, No. 2:92 CV 00603, slip op. at 1 (D. Conn. Jan. 29, 1993) (appeal pending).

[45] International Diatomite Producers Assoc. v. United States Social Sec. Admin., No. C-92-1634, slip op. at 8-9 (N.D. Cal. Apr. 28, 1993) (appeal pending).

[46] 5 U.S.C. § 552b (1988).

[47] 42 U.S.C. §§ 2286-2286i (1988 & Supp. III 1991).

[48] Natural Resources Defense Council v. Defense Nuclear Facilities Safety Bd., 969 F.2d 1248, 1249 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 2332 (1993).

information ("rap sheets")[49] fails to fulfill subpart (A)'s requirement of absolute withholding because the statute implies that the FBI has discretion to withhold records and, in fact, the FBI had exercised such discretion by its inconsistent manner of releasing "rap sheets" to the public.[50]

In a most extraordinary decision, the Ninth Circuit held that language in an appropriations act specifying that "[n]one of the funds provided in this Act may be expended to release information acquired from any handler" under a particular agricultural program,[51] does not satisfy the requirement of subpart (A) because through such language Congress prohibited only "the expenditure of funds" for releasing the information, not release of the information under the FOIA itself.[52]

Subpart (B)

Most Exemption 3 cases involve subpart (B), either explicitly or implicitly. For example, a provision of the Consumer Product Safety Act[53] has been held to set forth sufficiently definite withholding criteria for it to fall within the scope of subpart (B),[54] and the provision which prohibits the Commission from disclosing any information that is submitted to it pursuant to section 15(b) of the Act[55] has been held to meet the requirements of subpart (B) by referring to particular types of matters to be withheld.[56]

Section 777 of the Tariff Act,[57] governing the withholding of "proprietary information," has been held to refer to particular types of information to be

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[49] 28 U.S.C. § 534 (1988).

[50] Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 736 n.9 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989); see also Dayton Newspapers, Inc. v. FBI, No. C-3-85-815, slip op. at 6 (S.D. Ohio Feb. 9, 1993) (motion for reconsideration pending).

[51] Agricultural, Rural Development, and Related Agencies Appropriations Act of 1988, Pub. L. No. 100-460, § 630, 102 Stat. 2229, 2262 (1988).

[52] Cal-Almond, Inc. v. United States Dep't of Agric., 960 F.2d 105, 108 (9th Cir. 1992).

[53] 15 U.S.C. § 2055(b)(1) (1988).

[54] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 122 (1980).

[55] 15 U.S.C. § 2055(b)(5) (1988).

[56] Reliance Elec. Co. v. Consumer Prod. Safety Comm'n, No. 87-1478, slip op. at 16-17 (D.D.C. Sept. 19, 1989).

[57] 19 U.S.C. § 1677f (1988 & Supp. IV 1992).

withheld and thus to be a subpart (B) statute.[58] Section 12(d) of the Railroad Unemployment Insurance Act[59] refers to particular types of matters to be withheld--information which would reveal employees' identities--and thus has been held to satisfy subpart (B).[60]

Similarly, it has been held that section 12(c)(1) of the Export Administration Act, governing the disclosure of export licenses and applications,[61] authorizes the withholding of a sufficiently narrow class of information to satisfy the requirements of subpart (B) and thus qualifies as an Exemption 3 statute.[62] Likewise, the Collection and Publication of Foreign Commerce Act,[63] which explicitly provides for nondisclosure of shippers' export declarations, qualifies as an Exemption 3 statute under subpart (B).[64]

The Supreme Court has held that section 102(d)(3) of the National Security Act of 1947,[65] which requires the Director of the CIA to protect "intelligence sources and methods," clearly refers to particular types of matters to be withheld and thus comes within the ambit of subpart (B).[66] Likewise, section

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[58] Mudge Rose Guthrie Alexander & Ferdon v. United States Int'l Trade Comm'n, 846 F.2d 1527, 1530 (D.C. Cir. 1988).

[59] 45 U.S.C. § 362(d) (1988 & Supp. III 1991).

[60] Association of Retired R.R. Workers v. United States R.R. Retirement Bd., 830 F.2d 331, 334 (D.C. Cir. 1987); National Ass'n of Retired & Veteran Ry. Employees v. Railroad Retirement Bd., No. 87-117, slip op. at 5 (N.D. Ohio Feb. 20, 1991).

[61] 50 U.S.C. app. § 2411(c)(1) (1988).

[62] Africa Fund v. Mosbacher, No. 92 Civ. 289, slip op. at 14 (S.D.N.Y. May 26, 1993) (Export Administration Act protection held to apply to agency denial made after Act expired and before subsequent reextension); Lessner v. United States Dep't of Commerce, 827 F.2d 1333, 1336-37 (9th Cir. 1987) (construing statute as effective in 1987).

[63] 13 U.S.C. § 301(g) (1988).

[64] Africa Fund v. Mosbacher, slip op. at 13; Young Conservative Found. v. United States Dep't of Commerce, No. 85-3982, slip op. at 8 (D.D.C. Mar. 25, 1987).

[65] 50 U.S.C. § 403(d)(3) (1988).

[66] CIA v. Sims, 471 U.S. 159, 167 (1985); see also Maynard v. CIA, 986 F.2d 547, 554 (1st Cir. 1993) (under § 403(d)(3) it is responsibility of Director of Central Intelligence to determine whether sources or methods should be disclosed); Krikorian v. Department of State, 984 F.2d 461, 465 (D.C. Cir. 1993 (same); Hunt v. CIA, 981 F.2d 1116, 1118 (9th Cir. 1992) (same); Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990) (same); Knight v. CIA, 872 F.2d 660, 663 (8th Cir. 1989) (same), cert. denied, 494 U.S. 1004 (1990).

6 of the Central Intelligence Agency Act of 1949[67]--protecting from disclosure "the organization, functions, names, official titles, salaries or numbers of personnel" employed by the CIA--meets the requirements of subpart (B).[68] Similarly, section 6 of Public Law No. 86-36,[69] pertaining to the organization, functions, activities and personnel of the NSA, has been held to qualify as an subpart (B) statute,[70] as has 18 U.S.C. § 798(a), which criminalizes the disclosure of any classified information "concerning the nature, preparation, or use of any code, cipher or cryptographic system of the United States."[71] A provision of the Atomic Energy Act, prohibiting the disclosure of "Restricted Data" to the public,[72] refers to particular types of matters and thus has been held to qualify as a subpart (B) statute as well.[73]

Section 7332 of the Veterans Health Administration Patient Rights Statute[74] generally prohibits disclosure of even the abstract fact that medical records on named individuals are maintained pursuant to that section, but it provides specific criteria under which particular medical information may be released, and thus has been found to satisfy the requirements of subpart (B).[75]

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[67] 50 U.S.C. § 403g (1988).

[68] See, e.g., Rothschild v. CIA, No. 91-1314, slip op. at 6 (D.D.C. Mar. 25, 1992); Carney v. CIA, No. 88-602, slip op. at 11 (C.D. Cal. Apr. 30, 1991); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 567 (S.D.N.Y. 1989); Pfeiffer v. CIA, 721 F. Supp. 337, 341-42 (D.D.C. 1989).

[69] 50 U.S.C. § 402 note (1988).

[70] Founding Church of Scientology v. NSA, 610 F.2d 824, 828 (D.C. Cir. 1979); Hayden v. NSA, 452 F. Supp. 247, 252 (D.D.C. 1978), aff'd, 608 F.2d 1381 (D.C. Cir. 1979), cert. denied, 466 U.S. 937 (1980). But see Weberman v. NSA, 490 F. Supp. 9, 14-15 (S.D.N.Y. 1980) (confirming or denying existence of intercepted telegram does not reveal information integrally related to specific NSA activity), rev'd on other grounds & remanded, 646 F.2d 563 (2d Cir. 1980).

[71] Winter v. NSA, 569 F. Supp. 545, 548 (S.D. Cal. 1983); see also Gilmore v. NSA, No. C 92-3646, slip op. at 20-21 (N.D. Cal. May 3, 1993) (information on cryptography currently used by NSA "integrally related" to function and activity of intelligence gathering and thus protected).

[72] 42 U.S.C. § 2162(a) (1988).

[73] Meeropol v. Smith, No. 75-1121, slip op. at 53-55 (D.D.C. Feb. 29, 1984), aff'd in relevant part & remanded in part sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986). But see General Elec. Co. v. NRC, 750 F.2d 1394, 1401 (7th Cir. 1984) (42 U.S.C. § 2133(b)(3) (1988), concerning technical information furnished by license applicants, lacks sufficient specificity to qualify as Exemption 3 statute).

[74] 38 U.S.C. § 7332 (1988 & Supp. III 1991).

[75] Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992).

One court has suggested that section 5038 of the Juvenile Delinquency Records Statute,[76] which generally prohibits disclosure of the existence of records compiled pursuant to that section, but which does provide specific criteria for releasing the information, qualifies as a subpart (B) statute.[77]

The Court of Appeals for the District of Columbia Circuit has held that a portion of the Patent Act[78] satisfies subpart (B) because it identifies the types of matters--patent applications and information concerning them--intended to be withheld.[79] As well, the portion of the Civil Service Reform Act concerning the confidentiality of certain labor relations training and guidance materials,[80] has been held to qualify as a subpart (B) withholding statute.[81]

The Commodity Exchange Act,[82] which prohibits the disclosure of business transactions, market positions, trade secrets, or customer names of persons under investigation under the Act, has been held to refer to particular types of matters and thus to satisfy subpart (B).[83] The D.C. Circuit has recently held that section 316(d)(2) of the Federal Aviation Act,[84] relating to security data the disclosure of which would be detrimental to the safety of airline travelers, similarly shields that particular data from disclosure under the FOIA.[85] Finally, it also has been held that the DOD's "technical data" statute,[86] which protects technical information with "military or space application" for which a license is required for export, satisfies subpart (B) because it refers to suffi-

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[76] 18 U.S.C. § 5038 (1988).

[77] McDonnell v. United States, No. 91-5916, slip op. at 35-40 (3d Cir. Sept. 21, 1993) (holding state juvenile delinquency records not within scope of statute) (to be published).

[78] 35 U.S.C. § 122 (1988).

[79] Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980); accord Leeds v. Quigg, 720 F. Supp. 193, 194 (D.D.C. 1989).

[80] 5 U.S.C. § 7114(b)(4) (1988).

[81] Dubin v. Department of the Treasury, 555 F. Supp. 408, 412 (N.D. Ga. 1981), aff'd, 697 F.2d 1093 (11th Cir. 1983) (table cite); National Treasury Employees Union v. OPM, No. 76-695, slip op. at 4 (D.D.C. July 9, 1979).

[82] 7 U.S.C. § 12 (1988 & Supp. IV 1992).

[83] Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47, 49 (D.D.C. 1979).

[84] 49 U.S.C. app. § 1357(d)(2) (1988).

[85] Public Citizen, Inc. v. FAA, 988 F.2d 186, 194 (D.C. Cir. 1993).

[86] 10 U.S.C. § 130 (1988 & Supp. IV 1992).

ciently particular types of matters.[87]

Alternative Analyses

Some statutes have been found to satisfy both Exemption 3 subparts. For example, while the Court of Appeals for the Third Circuit has held that section 222(f) of the Immigration and Nationality Act[88] sufficiently limits the category of information it covers--records pertaining to the issuance or refusal of visas and permits to enter the United States--to qualify as an Exemption 3 statute under subpart (B),[89] the Court of Appeals for the District of Columbia Circuit has specifically held that the section satisfies subpart (A) as well as subpart (B).[90]

Similarly, Exemption 3 protection for information pertaining to court-ordered wiretaps[91] has been recognized by district courts on a variety of bases.[92] However, in Lam Lek Chong v. DEA,[93] the D.C. Circuit, finding that "on its face, Title III clearly identifies intercepted communications as the subject of its disclosure limitations," held that "Title III falls squarely within the scope of subsection (B)'s second prong, as a statute referring to particular matters to be withheld."[94] Recently, "pen register" applications and orders, ob-

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[87] Colonial Trading Corp. v. Department of the Navy, 735 F. Supp. 429, 431 (D.D.C. 1990); see also American Friends Serv. Comm. v. DOD, No. 83-4916, slip op. at 10 (E.D. Pa. Sept. 25, 1986), rev'd on other grounds, 831 F.2d 441 (3d Cir. 1987).

[88] 8 U.S.C. § 1202(f) (1988).

[89] DeLaurentiis v. Haig, 686 F.2d 192, 194 (3d Cir. 1982); accord Smith v. Department of Justice, No. 81-CV-813, slip op. at 10-11 (N.D.N.Y. Dec. 13, 1983).

[90] Medina-Hincapie v. Department of State, 700 F.2d 737, 741-42 (D.C. Cir. 1983).

[91] 18 U.S.C. §§ 2510-2520 (1988 & Supp. IV 1992).

[92] See Gonzalez v. United States Dep't of Justice, No. 88-913, slip op. at 3-4 (D.D.C. Oct. 25, 1988) (holding that 18 U.S.C. § 2511(2)(a)(ii), which regulates disclosure of existence of wiretap intercepts, meets requirements of subpart (A)); Docal v. Bennsinger, 543 F. Supp. 38, 43-44 (M.D. Pa. 1981) (relying upon entire statutory scheme of Title III, 18 U.S.C. §§ 2510-2520, but not distinguishing between Exemption 3 subparts); Carroll v. United States Dep't of Justice, No. 76-2038, slip op. at 2-3 (D.D.C. May 26, 1978) (holding that 18 U.S.C. § 2518(8), which regulates disclosure of contents of wiretap intercepts, meets requirements of subpart (A)).

[93] 929 F.2d 729 (D.C. Cir. 1991).

[94] Id. at 733; see also Manchester v. DEA, No. 91-2498, slip op. at 14 (E.D. Pa. June 11, 1993) (wiretap applications and derivative information fall within purview of statute).

tained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, have been held to be protected from disclosure by a provision of that statute[95] and Exemption 3.[96]

The withholding of tax return information has been approved under three different theories. The United States Supreme Court and most appellate courts to have considered the matter have held either explicitly or implicitly that § 6103 of the Internal Revenue Code[97] satisfies subpart (B) of Exemption 3.[98] The Courts of Appeals for the D.C., Fifth, Sixth and Tenth Circuits have further reasoned that § 6103 is a subpart (A) statute to the extent that a person is not entitled to access to tax returns or return information of other taxpayers.[99] It should be noted that pursuant to § 6103(b)(2), individuals are not entitled to tax return information on themselves if it is determined that release would impair enforcement by the IRS.[100] Of course, it also must be remembered that

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[95] 18 U.S.C. § 3123(d) (1988).

[96] Manna v. United States Dep't of Justice, 815 F. Supp. 798, 812 (D.N.J. 1993).

[97] 26 U.S.C. § 6103 (1988 & Supp. III 1991).

[98] See, e.g., Church of Scientology v. IRS, 484 U.S. 9, 15 (1987); Aronson v. IRS, 973 F.2d 962, 964-65 (1st Cir. 1992) (IRS lawfully exercised discretion to withhold street addresses pursuant to 26 U.S.C. § 6103(m)(1)); Long v. IRS, 891 F.2d 222, 224 (9th Cir. 1989) (deletion of taxpayers' identification does not alter confidentiality of § 6103 information); DeSalvo v. IRS, 861 F.2d 1217, 1221 (10th Cir. 1988); Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986); Long v. IRS, 742 F.2d 1173, 1179 (9th Cir. 1984); Ryan v. Bureau of Alcohol, Tobacco & Firearms, 715 F.2d 644, 645 (D.C. Cir. 1983); Currie v. IRS, 704 F.2d 523, 527-28 (11th Cir. 1983); Willamette Indus. v. United States, 689 F.2d 865, 867 (9th Cir. 1982), cert. denied, 460 U.S. 1052 (1983); Barney v. IRS, 618 F.2d 1268, 1274 n.15 (8th Cir. 1980) (dictum); Chamberlain v. Kurtz, 589 F.2d 827, 843 (5th Cir.), cert. denied, 444 U.S. 842 (1979).

[99] D.C. Circuit: Stebbins v. Sullivan, No. 90-5361, slip op. at 1 (D.C. Cir. July 22, 1992); Fifth Circuit: Linsteadt v. IRS, 729 F.2d 998, 1000 (5th Cir. 1984); Sixth Circuit: Fruehauf Corp. v. IRS, 566 F.2d 574, 578 n.6 (6th Cir. 1977); Tenth Circuit: DeSalvo v. IRS, 861 F.2d at 1221 n.4; see also Kamman v. IRS, No. 91-1352, slip op. at 7 (D. Ariz. Mar. 13, 1992) (deletion of taxpayer name from appraisals of property does not remove documents from protection under § 6103(b)); Stephenson v. IRS, No. C78-1071A, slip op. at 3 (N.D. Ga. Sept. 21, 1981). But see Gray, Plant, Mooty, Mooty & Bennett v. IRS, No. 4-90-210, slip op. at 7 (D. Minn. Dec. 12, 1990) (public report must be released because it does not qualify as "return information" as it does not include data in form which can be associated with particular taxpayer).

[100] See Gillin v. IRS, 980 F.2d 819, 822 (1st Cir. 1992) (per curiam) (differential function scores used to identify returns most in need of examination or audit held exempt from disclosure); Long v. IRS, 891 F.2d at 224 (computer tapes used to develop discriminant function formulas protected); In re Church

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EXEMPTION 3

§ 6103 applies only to tax return information obtained by the Department of the Treasury, not to such information maintained by other agencies which was obtained by means other than through the provisions of the Internal Revenue Code.[101]

At least one court of appeals and several district courts have explicitly embraced a third theory based upon the reasoning of Zale Corp. v. IRS.[102] These courts have held that it is not necessary to view § 6103 as an Exemption 3 statute in order to withhold tax return information because the provisions of this tax code section are intended to operate as the sole standard governing the disclosure or nondisclosure of such information, thereby "displacing" the FOIA.[103]

Viewing § 6103 as a "displacement" statute permits the courts to avoid the de novo review required by the FOIA and to apply instead less stringent standards of review pursuant to the Administrative Procedure Act,[104] and can relieve agencies from certain procedural requirements of the FOIA, such as the time limitations for responding to requests and the duty to segregate and release

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[100](...continued)
of Scientology Flag Serv. Org./IRS FOIA Litigation, No. 91-423, slip op. at 3-4 (M.D. Fla. May 19, 1993) ("tolerance criteria" and "discriminant function scores" properly withheld) (multidistrict litigation case); Rollins v. United States Dep't of Justice, No. 90-3170, slip op. at 11 (S.D. Tex. June 30, 1992) (IRS memoranda revealing scope and direction of investigation properly withheld); Starkey v. IRS, No. 91-20040, slip op. at 5 (N.D. Cal. Dec. 6, 1991) (same); Church of Scientology v. IRS, No. 89-5894, slip op. at 3 (C.D. Cal. Mar. 3, 1991) (release of document referring to information obtainable under various treaties would chill future cooperation of foreign governments and tax-treaty partners); Ferguson v. IRS, No. C-89-4048, slip op. at 4 (N.D. Cal. Oct. 31, 1990) (standards and data used in selection and examination of returns are exempt from disclosure where they would impair IRS enforcement); Casa Investors, Ltd. v. Gibbs, No. 88-2485, slip op. at 5-6 (D.D.C. Oct. 11, 1990) (recommendation for settlement of tax controversies prepared by low-level IRS employees require protection). But see LeMaine v. IRS, No. 89-2914, slip op. at 12 (D. Mass. Dec. 10, 1991) (release of information commonly revealed to public in tax enforcement proceedings would not "seriously impair Federal tax administration" overall).

[101] See FOIA Update, Spring 1988, at 5.

[102] 481 F. Supp. 486, 490 (D.D.C. 1979).

[103] See, e.g., Cheek v. IRS, 703 F.2d 271, 271 (7th Cir. 1983) (§ 6103 also "displaces" Privacy Act of 1974); King v. IRS, 688 F.2d 488, 495 (7th Cir. 1982); Kuzma v. IRS, No. 81-600E, slip op. at 7-8 (W.D.N.Y. Dec. 31, 1984); Hosner v. IRS, 3 Gov't Disclosure Serv. (P-H) ¶ 83,164, at 83,816 (D.D.C. Mar. 31, 1983); Hulsey v. IRS, 497 F. Supp. 617, 618 (N.D. Tex. 1980); see also White v. IRS, 707 F.2d 897, 900 (6th Cir. 1983) (indicating approval of Zale).

[104] 5 U.S.C. §§ 701-706 (1988).

nonexempt information.[105] Nevertheless, even under this approach the government may be required to provide detailed Vaughn Indexes of the information being withheld, rather than general affidavits; the Sixth Circuit required this despite the fact that the court below had relied solely on the "displacement" theory for its decision.[106]

However, other courts have specifically refused to adopt this "displacement" analysis on the ground that to do so, once it is already evident that § 6103 is an Exemption 3 statute, "would be an exercise in judicial futility [requiring district courts] to engage in both FOIA and Zale analyses when confronted" with such cases.[107] Most significantly, the D.C. Circuit in 1986 squarely rejected the "displacement" argument on the basis that the procedures in § 6103 for members of the public to obtain access to IRS documents do not duplicate, and thus do not "displace," those of the FOIA.[108]

The D.C. Circuit's rejection of the "displacement" theory in relation to § 6103 is consistent with previous D.C. Circuit decisions involving similar "displacement" arguments. For example, it had previously rejected a "displacement" argument involving the Department of State's Emergency Fund statutes[109] when it held that inasmuch as Exemption 3 is not satisfied by these statutes, information cannot be withheld pursuant to them, even though they were enacted after the FOIA.[110]

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[105] See Grasso v. IRS, 785 F.2d at 73-74; White v. IRS, 707 F.2d at 900; Goldsborough v. IRS, No. Y-81-1939, slip op. at 12 (D. Md. May 10, 1984); Green v. IRS, 556 F. Supp. 79, 84 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984) (table cite); Meyer v. Department of the Treasury, 82-2 U.S. Tax Cas. (CCH) ¶ 9678, at 85,448 (W.D. Mich. Oct. 2, 1982).

[106] See Osborn v. IRS, 754 F.2d 195, 197-98 (6th Cir. 1985).

[107] Currie v. IRS, 704 F.2d at 528; accord Grasso v. IRS, 785 F.2d at 74; Long v. IRS, 742 F.2d at 1177 (also rejecting ERTA Amendment as "displacement" statute); Linsteadt v. IRS, 729 F.2d at 1001-02; see also Britt v. IRS, 547 F. Supp. 808, 813 (D.D.C. 1982); Tigar & Buffone v. CIA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,172, at 81,461 (D.D.C. Feb. 23, 1981).

[108] Church of Scientology v. IRS, 792 F.2d 146, 148-50 (D.C. Cir. 1986).

[109] 22 U.S.C. § 2671 (1988); 31 U.S.C. § 107 (1988).

[110] See Washington Post Co. v. United States Dep't of State, 685 F.2d 698, 703-04 & n.9 (D.C. Cir. 1982), cert. granted, 464 U.S. 812, vacated & remanded, 464 U.S. 979 (1983). (After the Supreme Court granted the government's petition for certiorari, the Washington Post Company withdrew its FOIA request, which had the procedural effect of nullifying the D.C. Circuit's decision. Thus, the Supreme Court has never substantively reviewed this issue.) See also FOIA Update, Fall 1983, at 11; cf. United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 153-54 (1989) (FOIA, not 28 U.S.C. § 1914 (1988), governs disclosure of court records in possession of government agencies); Paisley v. CIA, 712 F.2d 686, 697 (D.C. Cir. 1983) (FOIA, not Speech

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Yet the D.C. Circuit has held that the procedures of the Presidential Recordings and Materials Preservation Act[111] exclusively govern the disclosure of transcripts of the tape recordings of President Nixon's White House conversations, based upon the Act's comprehensive, carefully tailored procedure for releasing Presidential materials to the public.[112] Thus, the "displacement" theory may still be advanced for statutes which provide procedures for the release of information to the public that, in essence, duplicate the procedures provided by the FOIA,[113] or for statutes which comprehensively override the FOIA's access scheme.[114] In this connection, it should be noted that the FOIA's specific fee provision referring to other statutes that set fees for particular types of records[115] has the effect of causing those statutes to "displace" the FOIA's basic fee provisions. (For a further discussion of this point, see Fees and Fee Waivers, below.)

Additional Considerations

Certain statutes fail to meet the requisites of either Exemption 3 prong. For instance, the Court of Appeals for the District of Columbia Circuit, in holding that provisions governing the FBI's sharing of "rap sheets"[116] do not qualify as an Exemption 3 statute because they do not expressly prohibit the disclosure of "rap sheets," explained that even if the provisions met the exemption's threshold requirement, they would not qualify as an Exemption 3 statute as they fail to satisfy either of its subparts.[117] Similarly, the Copyright Act of 1976[118] has been held to satisfy neither Exemption 3 subpart because rather than prohibiting disclosure, it specifically permits public inspection of copy-

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[110](...continued)
or Debate Clause, is definitive word on disclosure of information within government's possession); Church of Scientology v. United States Postal Serv., 633 F.2d 1327, 1333 (9th Cir. 1980) (postal statute does not displace more detailed and later-enacted FOIA absent specific indication of congressional intent to the contrary).

[111] 44 U.S.C. § 2111 (1988).

[112] Ricchio v. Kline, 773 F.2d 1389, 1395 (D.C. Cir. 1985).

[113] See Church of Scientology v. IRS, 792 F.2d at 149 (dictum).

[114] See Ricchio v. Kline, 773 F.2d at 1395; cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act, 42 U.S.C. § 275 (1988)); FOIA Update, Fall 1990, at 7-8 n.32.

[115] 5 U.S.C. § 552(a)(4)(A)(vi) (1988).

[116] 28 U.S.C. § 534 (1988).

[117] Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 736 n.9 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev'd on other grounds, 489 U.S. 749 (1989).

[118] 17 U.S.C. § 705(b) (1988).

righted documents.[119] It has also been held that section 360j(h) of the Medical Device Amendments of 1976[120] is not an Exemption 3 statute because it does not specifically prohibit disclosure of records,[121] nor is section 410(c)(6) of the Postal Reorganization Act[122] because the broad discretion afforded the Postal Service to release or withhold records is not sufficiently specific.[123]

A particularly difficult Exemption 3 issue was finally put to rest by the Supreme Court in 1988. In analyzing the applicability of Exemption 3 to the Parole Commission and Reorganization Act[124] and Rule 32 of the Federal Rules of Criminal Procedure, each of which governs the disclosure of presentence reports, the Supreme Court decisively held that they are Exemption 3 statutes in part.[125] The Court found that they do not permit the withholding of an entire presentence report, but rather only those portions of a presentence report pertaining to a probation officer's sentencing recommendations, certain diagnostic opinions, information obtained upon a promise of confidentiality, and information which, if disclosed, might result in harm to any person, and that "the remaining parts of the reports are not covered by this exemption, and thus must be disclosed unless there is some other exemption which applies to them."[126]

Another Exemption 3 issue concerns the Trade Secrets Act[127] which prohibits the unauthorized disclosure of commercial and financial information. Although the Supreme Court declined to decide whether the Trade Secrets Act is an Exemption 3 statute,[128] most courts confronted with the issue have held that it is not.[129]

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[119] See St. Paul's Benevolent Educ. & Missionary Inst. v. United States, 506 F. Supp. 822, 830 (N.D. Ga. 1980); see also FOIA Update, Fall 1983, at 3-5 ("OIP Guidance: Copyrighted Materials and the FOIA").

[120] 21 U.S.C. § 360j(h) (1988).

[121] Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1286 (D.C. Cir. 1983).

[122] 39 U.S.C. § 410(c)(6) (1988).

[123] Church of Scientology v. United States Postal Serv., 633 F.2d 1327, 1333 (9th Cir. 1980).

[124] 18 U.S.C. § 4208 (1988).

[125] United States Dep't of Justice v. Julian, 486 U.S. 1, 9 (1988).

[126] Id. at 11; see also FOIA Update, Spring 1988, at 1-2.

[127] 18 U.S.C. § 1905 (1988).

[128] Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979).

[129] See, e.g., Anderson v. HHS, 907 F.2d 936, 949 (10th Cir. 1990) ("[T]he broad and ill-defined wording of § 1905 fails to meet either of the requirements of Exemption 3."); Acumenics Research & Technology v. United

(continued...)

EXEMPTION 3

In 1987, the D.C. Circuit issued a long-awaited decision which "definitively" resolved the issue by holding that the Trade Secrets Act does not satisfy either of amended Exemption 3's requirements and thus does not qualify as a separate withholding statute.[130] First, its prohibition against disclosure is not absolute, as it prohibits only those disclosures that are "not authorized by law."[131] Because duly promulgated agency regulations can provide the necessary authorization for release, the agency "possesses discretion to control the applicability" of the Act.[132] The existence of this discretion precludes the Trade Secrets Act from satisfying subpart (A) of Exemption 3.[133] Moreover, the court held that the Trade Secrets Act fails to satisfy the first prong of subpart (B) because it "in no way channels the discretion of agency decisionmakers."[134] Indeed, the court concluded, this utter lack of statutory guidance renders the Trade Secrets Act susceptible to invocation at the "whim of an administrator."[135] Finally, it was held that the Act also fails to satisfy the second prong of subpart (B) because of the "encyclopedic character" of the material within its scope and the absence of any limitation on the agencies covered or the sources of data included.[136] Given all these elements, the court held that the Trade Secrets Act simply does not qualify as an Exemption 3 statute.[137]

The D.C. Circuit's decision on this issue is entirely consistent with the legislative history of the 1976 amendment to Exemption 3, which states that the

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[129](...continued)
States Dep't of Justice, 843 F.2d 800, 805 n.6, 806 (4th Cir. 1988) (finding "no basis" for argument that Exemption 3 and § 1905 prevent disclosure of information that is outside scope of Exemption 4); General Elec. Co. v. NRC, 750 F.2d 1394, 1401-02 (7th Cir. 1984) (same); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 686-87 (D.C. Cir. 1976) (implying that § 1905's prohibition is too general to be incorporated into Exemption 3); see also 9 to 5 Org. of Women Office Workers v. Board of Governors of the Fed. Reserve Sys., 721 F.2d 1, 12 (1st Cir. 1983) (specifically declining to address issue); United Technologies Corp. v. Marshall, 464 F. Supp. 845, 851 (D. Conn. 1979); St. Mary's Hosp., Inc. v. Califano, 462 F. Supp. 315, 317 (S.D. Fla. 1978), aff'd sub nom. St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407 (5th Cir. 1979); accord FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

[130] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137-43 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988).

[131] Id. at 1138.

[132] Id. at 1139.

[133] Id. at 1138.

[134] Id. at 1139.

[135] Id.

[136] Id. at 1140-41.

[137] Id. at 1141.

Trade Secrets Act was not intended to qualify as a nondisclosure statute within the exemption's purview and that any analysis of trade secrets and commercial or financial information should focus instead on the applicability of Exemption 4.[138] It also followed the Department of Justice's stated policy position on the issue.[139]

Lastly, a particularly controversial issue at one time was whether the Privacy Act of 1974[140] could serve as an Exemption 3 statute. The Privacy Act authorizes an individual to obtain access to those federal records maintained under the individual's name or personal identifier, subject to certain broad, system-wide exemptions.[141] If the Privacy Act had been regarded as an Exemption 3 statute, records exempt from disclosure to first-party requesters under the Privacy Act also would have been exempt under the FOIA; if not, requesters would have been able to obtain information on themselves under the FOIA notwithstanding that such information was exempt under the Privacy Act. In the early 1980's, the Department of Justice took the position that the Privacy Act was an Exemption 3 statute within the first-party requester context.[142] When a conflict subsequently arose among the circuits which considered the proper relationship between these two access statutes, the Supreme Court agreed to resolve the issue.[143] However, these cases became moot when Congress, upon enacting the Central Intelligence Agency Information Act in 1984, explicitly provided that the Privacy Act is not an Exemption 3 statute.[144] Thus, the Supreme Court dismissed the appeals in these cases and this issue has been placed entirely to rest.[145]

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[138] H.R. Rep. No. 880, 94th Cong., 2d Sess. 23 (1976), reprinted in 1976 U.S.C.C.A.N. 2191, 2205; see Anderson v. HHS, 907 F.2d at 949-50; CNA Fin. Corp. v. Donovan, 830 F.2d at 1142 n.70; see also Acumenics Research & Technology v. United States Dep't of Justice, 843 F.2d at 805 n.6; General Elec. Co. v. NRC, 750 F.2d at 1401-02; General Dynamics Corp. v. Marshall, 607 F.2d 234, 236-37 (8th Cir. 1979).

[139] See FOIA Update, Summer 1986, at 6 (advising agencies that Trade Secrets Act should not be regarded as Exemption 3 statute).

[140] 5 U.S.C. § 552a (1988 & Supp. IV 1992).

[141] See, e.g., 5 U.S.C. § 552a(j)(2).

[142] See FOIA Update, Spring 1983, at 3.

[143] See Provenzano v. United States Dep't of Justice, 717 F.2d 799 (3d Cir. 1983), cert. granted, 466 U.S. 926 (1984); Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983), cert. granted, 466 U.S. 926 (1984).

[144] Pub. L. No. 98-477, § 2(c), 98 Stat. 2209, 2212 (1984) (amending what is now subsection (t) of the Privacy Act).

[145] See United States Dep't of Justice v. Provenzano, 469 U.S. 14 (1984); FOIA Update, Fall 1984, at 4.

EXEMPTION 4

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[1] This exemption is intended to protect the interests of both the government and submitters of information. It encourages the voluntary submission of useful commercial or financial information to the government and provides assurance that such information will be reliable. The exemption also protects those who are required to submit such commercial or financial information from the competitive disadvantages that could result from disclosure. The exemption covers two broad categories of information in federal agency records: (1) trade secrets; and (2) information which is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

Trade Secrets

For purposes of Exemption 4, the Court of Appeals for the District of Columbia Circuit in Public Citizen Health Research Group v. FDA,[2] has adopted a narrow "common law" definition of the term "trade secret" that differs from the broad definition used in the Restatement of Torts. The D.C. Circuit's decision in Public Citizen represented a distinct departure from what until then had been almost universally accepted by the courts--that "trade secret" is a broad term extending to virtually any information that provides a competitive advantage. In Public Citizen, the term "trade secret" was narrowly defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[3] This definition requires that there be a "direct relationship" between the trade secret and the productive process.[4]

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[1] 5 U.S.C. § 552(b)(4) (1988).

[2] 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[3] Id.

[4] Id.; see, e.g., Citizens Comm'n on Human Rights v. FDA, No. 92-5313, slip op. at 14 (C.D. Cal. May 10, 1993) ("information about how a pioneer drug product is formulated, chemically composed, manufactured, and quality controlled" held protectible as trade secrets); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 1-2 (D.D.C. Nov. 20, 1987) (design drawings of airplane fuel pumps developed by private company and used by Air Force held protectible as trade secrets), modifying (D.D.C. Sept. 29, 1987), motion to amend judgment denied (D.D.C. Dec. 16, 1987); Yamamoto v. IRS, No. 83-2160, slip op. at 2 (D.D.C. Nov. 16, 1983) (report on computation of standard mileage rate prepared by private company and used by IRS held protectible as trade secret); cf. Myers v. Williams, No. 92-1609 (D. Or. Apr. 21, 1993) (preliminary injunction granted to prevent FOIA requester from disclosing trade secret acquired through mistaken, but nonetheless official, FOIA release) (non-FOIA case).

Three years ago, the Court of Appeals for the Tenth Circuit expressly adopted the D.C. Circuit's narrow definition of the term "trade secret," finding it "more consistent with the policies behind the FOIA than the broad Restatement definition."[5] In so doing, the Tenth Circuit noted that adoption of the broader Restatement definition "would render superfluous" the remaining category of Exemption 4 information "because there would be no category of information falling within the latter" category that would be "outside" the reach of the trade secret category.[6] Like the D.C. Circuit, the Tenth Circuit was "reluctant to construe the FOIA in such a manner."[7]

Commercial or Financial Information

The overwhelming bulk of Exemption 4 cases focus on whether the withheld information falls within its second, much larger category. To do so, the information must be commercial or financial, obtained from a person, and privileged or confidential.[8]

If information relates to business or trade, courts have little difficulty in considering it "commercial or financial."[9] The Court of Appeals for the District of Columbia Circuit has firmly held that these terms should be given their "ordinary meanings," and has specifically rejected the argument that the term "commercial" be confined to records that "reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them.[10] Similarly, in a case involving information

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[5] Anderson v. HHS, 907 F.2d 936, 944 (10th Cir. 1990).

[6] Id.

[7] Id.

[8] See, e.g., Gulf & Western Indus. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979); Consumers Union v. VA, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

[9] See, e.g., RMS Indus. v. DOD, No. C-92-1545, slip op. at 6 (N.D. Cal. Nov. 24, 1992) (requested "information is all financial because it directly reflects the financial capability of the companies to perform" a government contract and was obtained "in the bidding and award process").

[10] Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982); Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980)); see, e.g., Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) (appeal pending); ISC Group v. DOD, No. 88-631, slip op. at 7 (D.D.C. May 22, 1989); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (settlement negotiation documents reflecting "accounting and other internal procedures" deemed "commercial" as submitter had "commercial interest" in them); see also FOIA Update, Winter 1985, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value"); FOIA Update, Fall 1983, at 3-5 ("OIP Guidance: Copyrighted Mate-

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submitted by a labor union, the Court of Appeals for the Second Circuit held that the term "commercial" includes anything "pertaining or relating to or dealing with commerce."[11] Indeed, commercial information can include even material submitted by a nonprofit entity.[12]

Moreover, protection for financial information is not limited to economic data generated solely by corporations or other business entities, but rather has been held to apply to personal financial information as well.[13] Examples of items generally regarded as commercial or financial information include: business sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial condition.[14]

Obtained from a "Person"

The second of Exemption 4's specific criteria, that the information be "obtained from a person," is quite easily met in almost all circumstances. The term "person" refers to a wide range of entities, including corporations, state

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[10](...continued)
erials and the FOIA"). But see also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 244-45 (D.C. Cir. 1974) (scientific research designs submitted in grant applications not "commercial" absent showing that the research itself had any commercial character), cert. denied, 421 U.S. 963 (1975).

[11] American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978); see also Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) ("information relating to the employment and unemployment of workers constitutes commercial or financial information"); Brockway v. Department of the Air Force, 370 F. Supp. 738, 740 (N.D. Iowa 1974) (reports generated by a commercial enterprise "must generally be considered commercial information"), rev'd on other grounds, 518 F.2d 1184 (8th Cir. 1975).

[12] Critical Mass Energy Project v. NRC, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc) (finding that safety reports submitted by nonprofit consortium of nuclear power plants were "commercial in nature"), cert. denied, 113 S. Ct. 1579 (1993); see also Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 398 (5th Cir.) (nonprofit water supply company's audit reports deemed "clearly commercial"), cert. denied, 471 U.S. 1137 (1985); American Airlines, Inc. v. National Mediation Bd., 588 F.2d at 870 (nonprofit union's information deemed "commercial").

[13] See Washington Post Co. v. HHS, 690 F.2d at 266; FOIA Update, Fall 1983, at 14. But see also Washington Post Co. v. HHS, 690 F.2d at 266 (list of nonfederal employment positions held not "financial" within meaning of Exemption 4).

[14] See, e.g., Landfair v. United States Dep't of the Army, 645 F. Supp. 325, 327 (D.D.C. 1986).

governments and agencies of foreign governments.[15] The courts have held, however, that information generated by the federal government is not "obtained from a person" and is therefore excluded from Exemption 4's coverage.[16] Such information might possibly be protectible under Exemption 5, though, which incorporates a qualified privilege for sensitive commercial or financial information generated by the government.[17] (For a further discussion of the "commercial privilege," see Exemption 5, below.)

Documents prepared by the government can still come within Exemption 4, however, if they simply contain summaries or reformulations of information supplied by a source outside the government.[18] Moreover, the mere fact that the government supervises or directs the preparation of information submitted by sources outside the government does not preclude that information from being "obtained from a person."[19]

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[15] See, e.g., Comstock Int'l, Inc. v. Export-Import Bank, 464 F. Supp. 804, 806 (D.D.C. 1979) (corporation); Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) (state government); Stone v. Export-Import Bank, 552 F.2d 132, 137 (5th Cir. 1977) (foreign government agency), cert. denied, 434 U.S. 1012 (1978); see also Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776 (D.D.C. 1974) (foreign government or instrumentality is "person" for purposes of FOIA).

[16] See Allnet Communication Servs., Inc. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) ("person" under Exemption 4 "refers to a wide range of entities including corporations, associations and public or private organizations other than agencies") (appeal pending); see also, e.g., Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 404 (D.C. Cir. 1980); Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 469 (W.D.N.Y. 1987); Consumers Union v. VA, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

[17] See Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); accord Morrison-Knudsen Co. v. Department of the Army of the United States, 595 F. Supp. 352, 354-56 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985).

[18] See, e.g., Gulf & Western Indus. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979); Mulloy v. Consumer Prod. Safety Comm'n, No. 85-645, slip op. at 2 (S.D. Ohio Aug. 2, 1985) (manufacturing and sales data compiled in Establishment Inspection Report prepared by Commission investigator after on-site visit to plant held protectible under Exemption 4), aff'd, No. 85-3720 (6th Cir. July 22, 1986); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,044, at 81,121 (D.D.C. Dec. 4, 1980).

[19] Silverberg v. HHS, No. 89-2743, slip op. at 6 (D.D.C. June 14, 1991), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 4 (M.D. Fla. June 3, 1986). But see Consumers Union v. VA, 301 F. Supp. at 803 (where product testing was actually performed by government personnel, using their expertise and government equipment, resulting data held not "obtained from a person" for purposes of Exemption 4).

"Confidential" Information

The third requirement of Exemption 4 is met if information is "privileged or confidential." By far, most Exemption 4 litigation has focused on whether or not requested information is "confidential" for purposes of Exemption 4. In earlier years, courts based the application of Exemption 4 upon whether there was a promise of confidentiality by the government to the submitting party,[20] or whether the information was of the type not customarily released to the public by the submitter.[21]

These earlier tests were then superseded by the rule of National Parks & Conservation Ass'n v. Morton,[22] long considered to be the leading case on the issue, which significantly altered the test for confidentiality under Exemption 4. In National Parks, the Court of Appeals for the District of Columbia Circuit held that the test for confidentiality was an objective one.[23] Thus, whether information would customarily be disclosed to the public by the person from whom it was obtained was not considered dispositive.[24] Likewise, an agency's promise that information would not be released was not considered dispositive.[25] Instead, the D.C. Circuit declared in National Parks that the term "confidential" should be read to protect governmental interests as well as private ones, according to the following two-part test:

> To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[26]

These two principal Exemption 4 tests, which apply disjunctively, have often been referred to in subsequent cases as the "impairment prong" and the "competitive harm prong." In National Parks, the D.C. Circuit expressly reserved the question of whether any other governmental interests--such as compliance or program effectiveness--might also be embodied in a "third

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[20] See, e.g., GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

[21] See, e.g., Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1972).

[22] 498 F.2d 765 (D.C. Cir. 1974).

[23] Id. at 766.

[24] Id. at 767.

[25] Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (citing National Parks, 498 F.2d at 766).

[26] 498 F.2d at 770.

prong" of the exemption.[27]

Two years ago, in a surprising new development, D.C. Circuit Court Judge Randolph, joined by Circuit Court Judge Williams, suggested in a concurring opinion in Critical Mass Energy Project v. NRC, that if it were a question of first impression, they would "apply the common meaning of [the word] 'confidential' and [would] reject" the National Parks test altogether.[28] Judges Randolph and Williams contended that there was no "legitimate basis" for the D.C. Circuit's addition of "some two-pronged 'objective' test" for determining if material was "confidential" in light of the unambiguous language of the exemption.[29] Nevertheless, they recognized that they "were not at liberty" to apply their "common sense" definition because the D.C. Circuit had "endorsed the National Parks definition many times," thus compelling them to follow it as well.[30] Accordingly, the government petitioned for, and was granted, an en banc rehearing in Critical Mass[31] so that the full D.C. Circuit could have an opportunity to consider whether the definition of confidentiality set forth in National Parks--and followed by the panel majority in Critical Mass--was indeed faithful to the language and legislative intent of Exemption 4.[32]

In August of 1992, the D.C. Circuit issued its en banc decision in Critical Mass. After examining the "arguments in favor of overturning National Parks, [the court] conclude[d] that none justifies the abandonment of so well established a precedent."[33] This ruling was founded on the principle of stare decisis--which counsels against the overruling of an established precedent.[34] The D.C. Circuit determined that "[i]n obedience to" stare decisis, it would not "set aside circuit precedent of almost twenty years' standing."[35] In so holding, it noted the "widespread acceptance of National Parks by [the] other circuits," the lack of any subsequent action by Congress that would remove the "'conceptual underpinnings'" of the decision, and the fact that the test had not proven to

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[27] Id. at 770 n.17.

[28] 931 F.2d 939, 948 (D.C. Cir.) (Randolph & Williams, JJ., concurring), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

[29] 931 F.2d at 948.

[30] Id.

[31] 942 F.2d 799 (D.C. Cir. 1991).

[32] See FOIA Update, Fall 1992, at 1.

[33] 975 F.2d 871, 877 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

[34] 975 F.2d at 875.

[35] Id.

be "so flawed that [it] would be justified in setting it aside."[36]

Although the National Parks test for confidentiality under Exemption 4 was thus reaffirmed, the full D.C. Circuit went on to "correct some misunderstandings as to its scope and application."[37] Specifically, the court "confined" the reach of National Parks and established an entirely new standard to be used for determining whether information "voluntarily" submitted to an agency is "confidential."[38] The United States Supreme Court declined to review the D.C. Circuit's en banc decision[39] and thus it now stands as the leading Exemption 4 case on this issue.[40]

The Critical Mass Decision

Through its en banc decision in Critical Mass, a seven-to-four majority of the Court of Appeals for the District of Columbia Circuit established two distinct standards to be used in determining whether commercial or financial information submitted to an agency is "confidential" under Exemption 4.[41] Specifically, the tests for confidentiality set forth in National Parks & Conservation Ass'n v. Morton,[42] were confined "to the category of cases to which [they were] first applied; namely, those in which a FOIA request is made for financial or commercial information a person was obliged to furnish the Government."[43] The D.C. Circuit announced an entirely new test for the protection of information that is "voluntarily" submitted: Such information is now categorically protected provided it is not "customarily" disclosed to the public by the submitter.[44]

In reaching this result, the D.C. Circuit first examined the bases for its decision in National Parks and then identified various interests of both the government and submitters of information that are protected by Exemption 4.[45] By so doing, it found that different interests are implicated depending upon whether the requested information was submitted voluntarily or under compul-

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[36] Id. at 876-77.

[37] Id. at 875.

[38] Id. at 871, 879.

[39] 113 S. Ct. 1579 (1993).

[40] See FOIA Update, Spring 1993, at 1.

[41] 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993).

[42] 498 F.2d 765, 770 (D.C. Cir. 1974).

[43] 975 F.2d at 880.

[44] Id. at 879.

[45] Id. at 877-79.